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In the

Supreme Court of the United States

CITY OF LOVELAND, OHIO,

Petitioner,

v.

BOARD OF COMMISSIONERS OF HAMILTON COUNTY, OHIO, ET AL.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a state law claim raises a substantial federal question such that the action "arises under" federal law when the question does not require the determination of an important and disputed point of federal law, but instead entails only the application of settled federal law to the specific facts of the state-law case.

II. Whether a state-court defendant can evade the well-pleaded complaint rule, which prohibits removal based on a federal defense or counterclaim, by filing an original declaratory judgment action in federal court after the state-court action has commenced seeking preemptive adjudication of the federal defense or counterclaim.

III. Whether the potential impact of adjudication of a state-law claim on a federal court consent decree constitutes a federal question sufficient to create federal jurisdiction under 28 U.S.C. § 1331.

IV. Whether this Court should grant review to decide the question reserved in *Taylor v. Sturgell*, 553 U.S. 880 (2008): whether a non-party is bound by a federal judgment based solely on conduct that induced reliance by parties to that judgment.

PARTIES TO THE PROCEEDINGS IN THE SIXTH CIRCUIT

Petitioner is the City of Loveland, Ohio, which was the defendant in district court and appellant in the court of appeals.

Respondents are the Board of Commissioners of Hamilton County, Ohio, which was a plaintiff in district court and appellee in the court of appeals. The City of Cincinnati, Ohio, was an intervenor-plaintiff in the district court and appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The City of Loveland, Ohio, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 621 F.3d 465. The district court's opinion (App., *infra*, 21a-35a) is not reported.

JURISDICTION

The court of appeals entered its judgment on September 15, 2010. A timely petition for rehearing was denied on October 27, 2010 (App., *infra*, 36a-37a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 1331 of Title 28 of the United States Code provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Section 1441(b) of Title 28 of the United States Code provides:

> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or

> right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

STATEMENT OF THE CASE

Around 1970, petitioner, the City of Loveland, Ohio, placed its wastewater treatment plant and sewers (collectively, the "Polk Run System") into service. (App., *infra*, 3a.) In 1985, Loveland and the Board of Commissioners of Hamilton County, Ohio ("Board") entered into an agreement pursuant to which the Board was to maintain, repair, and operate the Polk Run System (the "1985 Agreement"). (App., *infra*, 3a.) The 1985 Agreement does not have an explicit termination date.

In 2002, the United States Environmental Protection Agency and two state regulators filed a complaint against the Board and the City of Cincinnati under the federal Clean Water Act, 33 U.S.C. §§ 1251-1387, because of frequent overflows in the numerous sewer systems (including Polk Run) operated by the Board. (App., *infra*, 3a-4a.) *United States v. Bd. of County Comm'rs, et al.*, No. 1:02-cv-00107 (S.D. Ohio) That action was resolved by a pair of consent decrees. (App., *infra*, 4a.) Loveland was not a party to that litigation or either of the resulting consent decrees. Notice of the lodging of the proposed decrees was published in the Federal Register on December 9, 2003. 68 Fed. Reg. 68651-02 (Dec. 9, 2003). The

Notice did not mention the Polk Run System, the 1985 Agreement, Loveland, or any limitations on Loveland's authority over its sewer system. *Id.*

On October 29, 2008, Loveland notified the Board it was terminating the 1985 Agreement effective December 31, 2009 (App., *infra*, 5a) because, *inter alia*, the Board planned to charge Loveland residents tens of millions of dollars to remediate other wastewater treatment plants and sewer systems that provide no services to Loveland residents. On the same date, Loveland filed a complaint against the Board in the Court of Common Pleas for Clermont County, Ohio. (App., *infra*, 5a.) Loveland requested (1) a declaratory judgment that its notice of termination of the 1985 Agreement was reasonable, and (2) an order that the Board must return control and operation of the Polk Run System to Loveland no later than January 1, 2010. (App., *infra*, 5a.)

The Board did not attempt to remove Loveland's action to federal court under 28 U.S.C. § 1441. Instead, six weeks after Loveland initiated its state-court action, the Board filed a complaint against Loveland in the United States District Court for the Southern District of Ohio. (App., *infra*, 6a.) The Board's complaint sought a declaratory judgment that Loveland could not terminate the 1985 Agreement. (App., *infra*, 5a.) Although the complaint named the EPA and the two state regulatory agencies as defendants, the complaint was explicit that "the Board is not seeking relief from the Regulators." (Dist. Ct. ECF Doc. No. 1, ¶ 20.)

The court denied Loveland's motion to dismiss for lack of jurisdiction, holding that it had jurisdiction

under both 28 U.S.C. § 1331 and the All Writs Act, 28 U.S.C. § 1651. (App., *infra*, 6a.) On the Board's and Cincinnati's motion, the district court then consolidated the Board's action with the consent decree case. (App., *infra*, 23a.) A month and a half later, on July 27, 2009, the Board voluntarily dismissed the EPA and the Regulators without prejudice. (Dist. Ct. ECF Doc. No. 364.)

The district court subsequently granted the Board and Cincinnati's motion for judgment on the pleadings, holding that Loveland's effort to terminate the 1985 Agreement constituted a "collateral attack on the Consent Decrees." (App., *infra*, 30a.) The court held that, although Loveland was not a party to either the consent decrees or the litigation that produced them, Loveland was collaterally estopped from exercising its state law right to terminate a contract. (App., *infra*, 32a.)

The court of appeals affirmed. (App., *infra*, 1a-20a.) The court first held that the district court had jurisdiction because, in its view, the putative impact that Loveland's termination of the 1985 Agreement would have on the consent decrees raised a federal question because the complaint "requests that the district court enforce its consent decree." (App. *infra*, 12a.)

The court also held that the case raised a substantial federal question within the meaning of *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). The court reasoned that Loveland's state-law contract claim, if granted, might require a modification of the consent decrees. (App., *infra*, 13a.) The court then

held that the potential impact of that hypothesized ruling transformed the state-law contract issue into a disputed federal question. (App., *infra*, 11a-12a.) The court of appeals further held that the complaint raised a substantial federal question because a federal agency was a party to the consent decree and the consent decree sought to enforce a federal statute. (App., *infra*, 13a.) The court then concluded that the exercise of jurisdiction would "not disturb any congressionally approved balance of federal and state judicial responsibilities." (App., *infra*, 14a.) "[S]ince federal consent decrees are at issue," the court explained, "it would make sense to have that court also resolve any issues that have a direct impact on the implementation of those consent decrees." (App., *infra*, 14a.) Finally, the court held that "Loveland's contention that it is not bound by the consent decree, while accurate, is immaterial" to the jurisdictional question. Because Loveland had not commented on the proposed decree when notice was published in the federal register, "Loveland forfeited its right to challenge" the effects of the consent decrees on it and thus similarly forfeited any state-law right to terminate its contract. (App., *infra*, 17a.)

REASONS FOR GRANTING THE WRIT

Five years after this Court characterized the decisions in *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006) and *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005) as being poles apart, the circuit courts are in conflict over which cases present *Grable*-like "nearly pure" questions of federal law appropriate for resolution by federal courts, and which present *Empire*-like legal questions

that are fact-specific, to be decided by state courts. Three circuits interpret *Empire* as having added gloss to the substantial federal question analysis articulated in *Grable*, and require the substantial federal question to be one of interpretation. Other circuits, including the Sixth Circuit in this decision, do not so understand *Grable* and *Empire*, and have held that a "substantial" federal question is present any time a case requires the mere application of some federal law to the facts.

In addition, the Sixth Circuit's decision is at war with this Court's longstanding limitations on federal court jurisdiction—limitations that are critical to enforcing the federalism balance and limited role of Article III courts prescribed by the Constitution. This Court has long held that two basic canons limit the universe of state-court cases that can be removed to federal court: (i) cases may be removed only if federal courts could have exercised original jurisdiction over the action; and (ii) courts will look only to the state-court plaintiff's well-pleaded complaint to determine if *it* presents a federal question. *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). A federal defense is not part of the complaint and, therefore, removal of an action from state court may not be premised on such grounds. *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 7 (1983). Nor will an actual or anticipated federal counterclaim establish "arising under" jurisdiction. *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002).

The Sixth Circuit has cast all of those limitations aside by holding that, rather than remove a case, a state-court defendant can simply file a federal defense as a declaratory judgment action, and that filing will

create the federal court jurisdiction that this Court's removal jurisprudence forecloses. This Court's review is needed to prevent that end run of longstanding federalism-based constraints on federal court jurisdiction.

Another question raised by the Sixth Circuit's decision is whether federal question jurisdiction can be predicated on nothing more than the impact that adjudication of a state-law claim might have—depending on how the state court rules—on a federal consent decree. In *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998), the Court held that the alleged preclusive effect of federal *judgments* on state-court actions does not raise a federal question. This Court has recognized, however, that federal consent decrees are different: sometimes considered a "judgment," other times labeled a "contract." *Firefighters Local No. 93 v. City of Cleveland*, 478 U.S. 501, 519 (1986). This case raises the still-undecided question, on which the circuits have adopted irreconcilable positions, whether the potential interference of a state-law claim with a federal *consent decree* raises a federal question for purposes of 28 U.S.C. § 1331. The Seventh Circuit says it does not. *In re the Application of County Collector*, 96 F.3d 890 (7th Cir. 1996). But the Sixth Circuit held here that it did, and the Fifth Circuit appears to agree. *MSOF Corp. v. Exxon Corp.*, 295 F.3d 485, 494 (5th Cir. 2002).

Finally, this case squarely presents the question that the Court has "never had occasion to consider": whether, and if so, under what circumstances, a non-party may be bound by a judgment in litigation to which it was not a party "through conduct inducing

reliance on others." *Taylor v. Sturgell*, 553 U.S. 880, 894 n. 7 (2008). In the present case, the Sixth Circuit ruled that Loveland, although not a party to the litigation that produced the consent decrees, was collaterally estopped from exercising its state-law right to terminate its contract with the Board because the Board and the other parties to the decrees relied to their detriment on Loveland's silence after notice of the consent decrees was published in the Federal Register.

I. THE COURT OF APPEALS' CREATION OF FEDERAL COURT JURISDICTION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS IN TWO RESPECTS AND SCRIPTS AN END RUN OF THIS COURT'S LONGSTANDING REMOVAL JURISPRUDENCE.

The Sixth Circuit's decision presents three significant jurisdictional issues this Court needs to address. First, it adds to the split between the circuits whether the application of federal law to a state law cause of action is sufficient to confer federal court jurisdiction. Second, the Sixth Circuit decided an important question of federal law that has not been, but should be, settled by this Court: whether a state court defendant can create federal jurisdiction by filing a declaratory judgment action in federal court that raises a federal defense to a currently-pending state law claim. Finally, the court's holding that a federal consent decree—and specifically, adverse impact on the decree—provides a sufficient basis for federal question jurisdiction is in direct conflict with the law of the Seventh Circuit.

A. The Rule of Law Created By The Sixth Circuit And Federal Circuit Conflicts With The Law Of The Ninth, Seventh, and Fifth Circuits Regarding Whether Mere Application Of Federal Law To The Facts Of A State-Law Cause Of Action Presents A Substantial Federal Question.

It is a fundamental principal that federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). They possess only the jurisdiction conferred on them by the Constitution or Congress, and it cannot be expanded by the judiciary. *Id.* A federal court is presumed to be without jurisdiction over an action, and the burden of establishing jurisdiction rests with the party wishing to enter federal court. *Id.*

Congress, under 28 U.S.C. § 1331, granted district courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." One basis for federal question jurisdiction is the presence of a "substantial federal question." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8-9 (1983). A state-law cause of action that turns on a substantial question of federal law presents federal courts with subject-matter jurisdiction over the state-law claim. *Id.*

This Court has held that there is no "single, precise, all-embracing test" to be used in determining whether a state-law cause of action raises a substantial federal question. *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). However, woven through the fabric of this Court's decisions is the understanding that "the mere

presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 813 (1986). In order to "arise under" a federal law, a genuine and substantial controversy must exist regarding the meaning or interpretation of a federal law. *Gully v. First Nat'l Bank*, 299 U.S. 109, 112-13 (1936). A mere federal issue "lurking in the background" will not suffice. *Id.* at 117.

Grable and *Empire* are the latest pronouncements by this Court on the subject. In *Grable*, the Court articulated the issue as whether "a state law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable*, 545 U.S. at 314. Finding the only contested issue in plaintiff's state-law action involved an interpretation of an important issue of federal law, the Court held the matter belonged in federal court. However, in *Empire,* as in *Gully* and *Merrell Dow* before it, the Court found federal jurisdiction lacking. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006). Contrasting the issue presented in *Empire* with the "poles apart" one found in *Grable*, the Court stated: "Grable presented a nearly 'pure issue of law,'" whereas *Empire*'s situation was "fact-bound and situation-specific." *Id.* at 700-01. Although that statement differentiated these two cases, circuit courts have issued conflicting rules of law for determining when the role of federal law is "substantial" under those precedents.

The Ninth, Seventh, and Fifth Circuits have interpreted the Court's decisions as creating a jurisdictional distinction between state law claims that require the determination of an important issue of federal law versus those that involve the application of settled federal law to the facts of the case. Two circuits, including the Sixth Circuit in the decision below, have held that *Grable* does not so limit federal jurisdiction. In these circuits, *Grable* does not stand for the proposition that only pure issues of law or claims involving construction of federal law belong in federal court. These courts found federal jurisdiction existed where a state law claim would involve the mere application of federal law to facts.

The Ninth Circuit refused to find federal jurisdiction in a state-law cause of action involving a federally regulated collective bargaining agreement. *Int'l Union of Operating Eng'rs v. County of Plumas*, 559 F.3d 1041 (9th Cir. 2009). The court explained that no substantial federal question existed because the case did "not turn on a construction of a federal law. Rather, it [was] influenced by an application of federal law to the arbitration clause." *Id.* at 1045.

The Seventh Circuit similarly denied jurisdiction over a state-law tort action involving the mere application of federal aviation regulations. *Bennett v. Sw. Airlines Co.*, 484 F.3d 907 (7th Cir. 2007). The meaning of federal statutes or regulations "play[ed] little or no role." *Id.* at 909. Instead, the case involved "fact-specific application of rules that come from both federal and state law, rather than a context-free inquiry into the meaning of a federal law." *Id.* at 910.

Finally, the Fifth Circuit held federal jurisdiction was lacking over a state-law claim for legal malpractice filed in state court that arose out of alleged malpractice in a federal trademark case. *Singh v. Duane Morris LLP*, 538 F.3d 334 (7th Cir. 2008). In order to present a successful claim for malpractice, the plaintiff would have to prove his underlying (federal) cause of action would have been meritorious but for the malpractice. *Id.* at 337. However, because the case did not directly present a question involving the interpretation of federal law, but only one that required the application of federal law to the underlying factual argument, the court held that no substantial federal question was presented.[1] *Id.* at 340.

The Federal and Sixth Circuits have taken the opposite tack, one that would allow significantly more cases into federal court. Faced with facts almost identical to those the Fifth Circuit confronted in *Singh*, the Federal Circuit came to a contrary conclusion. *Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, LLP*, 504 F.3d 1262 (Fed. Cir. 2008). Opining that *Grable* did not stand for the proposition that only pure issues of law or claims involving construction of federal law belonged in federal court, the court held that federal jurisdiction existed over a state-law legal malpractice claim because it would involve the application of federal patent law to the facts of the

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[1] *See also* Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 In L J 309 (2007)

predecessor case to determine whether malpractice had been committed. *Id.* at 1269.[2]

The Sixth Circuit's decision that federal jurisdiction existed in this case is also predicated on nothing more than the straightforward application of putative federal law to the particular facts of this case. According to the court, the federal issue is whether Loveland "may [] terminate the 1985 Agreement in its entirety because of the consent decree." (App., *infra*, 11a.) Even granting the court's assumption that the consent decree is a federal law that presents a federal issue, the court's statement makes clear that the question presented is not "what do federal consent decrees mean," or "what do Clean Water Act consent decrees mean," or even "how should a specific paragraph or section of a broad spectrum of Clean Water Act consent decrees be interpreted," but how this particular consent decree should be applied to the facts of this case.

The split among the circuits is outcome determinative. Had the Sixth Circuit applied the threshold determination whether the state law claim involves merely application of federal law, or a substantial and disputed interpretation of federal law—as the Fifth, Seventh, and Ninth Circuits do—it

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[2] The fact that federal court jurisdiction in *Air Measurement* derived from 28 U.S.C. § 1338 instead of § 1331 "is of no moment because in *Christianson*, the Supreme Court grafted § 1331 precedent onto its § 1338 analysis and held that the phrase 'arising under' has the same meaning in § 1338 as it does in § 1331. . ." *Id* at 1271 (*citing Christianson v. Colt Indus. Operating Corp* , 486 U.S. 800, 808-09 (1988))

would have denied federal jurisdiction. This Court's review is required in order to resolve this conflict.

B. The Sixth Circuit Has Decided an Important Issue of Federal Law That Has Not Been, But Should Be, Settled By This Court To Prevent The Wrongful Intrusion Of Federal Court Jurisdiction Into The States' Domain.

By upholding federal-court jurisdiction, the Sixth Circuit has mapped out a jurisdictional end run of this Court's precedent that would otherwise sharply constrain the ability of defendants to litigate their federal defenses to state-law claims in federal court. As discussed below, this Court has made clear that neither a federal defense nor a federal counterclaim supports federal removal jurisdiction. The Sixth Circuit's decision circumvents that law by inviting state-court defendants to run into federal court with declaratory judgment actions that seek federal court adjudication of their defenses to state-court actions and federal foreclosure of the state-law claim.

The "jurisdictional structure at issue in this case has remained basically unchanged for [more than a] century." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 7 (1983). An action filed in state court may be removed to federal court only if federal courts could have exercised original jurisdiction over the action. 28 U.S.C. § 1441. Another key part of the jurisdictional structure is the well-pleaded complaint rule, which provides that federal jurisdiction exists only where a "federal question is presented on the face of the plaintiff's properly pleaded complaint." *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475

(*quoting Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987)). These two basic tenets of federal jurisdiction serve the important role of avoiding potentially serious federal-state conflicts. *Franchise Tax Bd.*, 463 U.S. at 9-10.

When determining whether a state court case may be removed, a defense is not part of the properly pleaded complaint. Because a plaintiff is "master of the complaint," the plaintiff can choose a state court forum by abandoning any federal causes of action. *Caterpillar Inc.*, 482 U.S. at 398-99. Therefore, an action cannot be removed on the basis of a federal defense. *Franchise Tax Bd.*, 463 U.S. at 10. An actual or anticipated federal counterclaim also cannot form the basis of removal jurisdiction. *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002).

The well-pleaded complaint rule does not cease to apply because the action is one for declaratory judgment. *Franchise Tax Bd.*, 463 U.S. at 16. Just as a case cannot be removed based on a federal defense to a state-law claim, a declaratory judgment action cannot proceed based on a defense to an impending or threatened state court action. *Franchise Tax Bd.*, 463 U.S. at 16 (*citing Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950)). "Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law." *Public Svc. Comm'n v. Wycoff Co.*, 344 U.S. 237, 248 (1952). Therefore, the well-plead complaint rule requires jurisdiction to be determined by looking at the nature of the underlying claim, not the declaratory judgment complaint. *Id.*

The Sixth Circuit decision has circumvented that. In direct defiance of *Wycoff*, the court of appeals has allowed the hijacking of state-court claims filed in state-court by "one [actually] a defendant" just because it went "to federal court to begin his federal-law defense [after] the state-court beg[an] the case." *Id.* Permitting the Sixth Circuit decision to stand thus would allow state defendants to create "arising under" jurisdiction out of their state-court defenses just by filing a declaratory judgment action *after* the state litigation has commenced. If a defendant cannot create "arising under" jurisdiction by raising a federal counterclaim, surely the same defendant cannot create jurisdiction by filing that counterclaim as an original declaratory judgment complaint after the state-law action has commenced. If, as the Sixth Circuit has ruled, nothing more than a reformulation or relabeling of paperwork suffices to create federal jurisdiction, its decision will emasculate this Court's removal jurisprudence, which has long-stood as a substantive federalism-rooted constraint on federal jurisdiction.

Here, simply put, Loveland wants to exercise its contractual rights under the 1985 Agreement and the Board wants to prevent it from doing so. Had the Board sought to remove Loveland's complaint to federal court, the lack of federal jurisdiction would have been self-evident under this Court's precedent. Relabeling the removal petition as a declaratory judgment complaint should not change the jurisdictional answer. But by ignoring the pending state-court action that spawned the defensive federal declaratory judgment action, the Sixth Circuit bestowed federal court jurisdiction over ordinary state-law contract claims, and blew a hole in this Court's

careful balance of state and federal jurisdictional interests.

This case presents the Court with the opportunity to settle an important point of law unaddressed by *Skelly Oil*, *Wycoff*, and *Franchise Tax Board*: whether a defendant to a *currently pending* state court action can avoid the interplay between the well-pleaded complaint rule and removal requirements by filing its federal defense or federal counterclaim as an original federal declaratory judgment action in order to circumvent this Court's strict limitations on removal jurisdiction.

Absent this Court's intervention, the jurisdictional structure providing protection to federal-state comity will buckle under the Sixth Circuit's significant expansion of federal jurisdiction. Federal courts will step on the toes of the "rightful independence of state governments," *Holmes Group, Inc.*, 535 U.S. at 831, extending federal judicial power well beyond that which the Constitution, Congress, and this Court's precedent permit.

C. The Sixth Circuit's Decision Contradicts The Law Of The Seventh Circuit Regarding Whether Federal Question Jurisdiction Exists When There Is An Adverse Impact On A Federal Consent Decree.

In this case, the Sixth Circuit found that possible interference with a prior federal consent decree creates federal question jurisdiction. This holding directly contradicts the Seventh Circuit and necessitates this Court's review. The Sixth Circuit's opinion assumes

both that a federal consent decree is a "federal law" for purposes of 28 U.S.C. § 1331, and that the impact of a state-law claim on a consent decree raises a federal question. Neither of these questions has been directly addressed by this Court.

In *In re the Application of County Collector*, 96 F.3d 890 (7th Cir. 1996), the plaintiffs filed a complaint in state court against a school district, claiming the school district levied taxes against plaintiff's property in violation of state law. The taxes were levied as a result of a consent decree entered in a prior federal lawsuit involving the school district. The consent decree permitted the school district to levy taxes in order to fund remedial measures aimed at the school board's prior segregation and discrimination. The school district removed plaintiffs' complaint, arguing the complaint presented a federal question because the action could "effectively frustrate the school district's implementation of the consent decree" by drying up its sources of funds. *Id.* at 892.

The Seventh Circuit disagreed. "Contrary to the school district's position, a state law claim does not present a federal question merely because it impacts the terms of a federal consent decree." *Id.* at 897. Moreover, no federal question jurisdiction existed merely because the taxes at issue were levied pursuant to and in compliance with the decree. *Id.* at 899. Consent decrees are part judgment and part contract, so "it is the agreement of the parties, rather than the force of law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." *Id.* (*quoting Firefighters Local No. 93 v. City of Cleveland*, 478 U.S. 501, 522 (1986)) (original emphasis removed). Therefore, even though the

litigation leading to the consent decree was clearly based on federal law, the consent decree did not itself become a federal law. *Id.*

Although this Court has addressed related issues in connection with settlement agreements and federal judgments since *County Collector*, it has yet to decide whether an adverse impact on a federal *consent decree* presents a federal question.[3] Such decrees are neither contracts nor judgments; they contain attributes of both, which has resulted in them being treated differently for different purposes. *Firefighters Local No. 93*, 478 U.S. at 519 (*quoting United States v. ITT Continental Baking Co.*, 420 U.S. 223, 237 n. 10 (1975)). Remaining unanswered by the Court is whether, in light of the hybrid nature of consent decrees, an adverse impact on them confers federal jurisdiction.

This case squarely presents that issue to the Court. The Sixth Circuit found federal question jurisdiction because Loveland attempted to terminate the 1985 Agreement, which would allegedly impact the consent decrees due to the "removal of property, the Polk Run Segment, from the consent decree obligations." (App., *infra*, 11a.) The consent decree was created by agreement between the Board and the other parties to

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[3] In *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 31 (2002), the Court determined that a federal question is not presented when a party to a state-court action violates the terms of a *settlement agreement* it entered into in a prior federal case. Additionally, the assertion that state-court claims brought by a non-party to the previously litigation are completely precluded due to a prior *federal judgment* does not present a federal question either. *Rivet*, 522 U.S. at 476.

the consent decree; it was *not* created by the Clean Water Act. Therefore, although the litigation that begat the consent decree was based on federal law, the consent decree itself is not a federal law upon which the district court could predicate federal question jurisdiction. By the same token, the potential that a judgment in Loveland's state court action might have an adverse impact on the consent decree does not raise a federal question.

The Sixth Circuit's decision cannot be reconciled with the Seventh Circuit. Given the conflict between the two circuits concerning the jurisdictional effect of an adverse impact on a federal consent decree, this Court's review is required to ensure uniformity in federal law. Doing so will enforce proper federalism constraints on federal court jurisdiction and interference with pending state court litigation.

II. THE SIXTH CIRCUIT'S DECISION PRESENTS AND WRONGLY RESOLVES A QUESTION RESERVED BY THIS COURT CONCERNING WHETHER DUE PROCESS PERMITS A NON-PARTY TO BE BOUND BY A FEDERAL JUDGMENT SOLELY BECAUSE ITS CONDUCT ALLEGEDLY INDUCED RELIANCE ON THAT JUDGMENT.

Generally, "one is not bound by a judgment *in personam* in a litigation in which he is not designated as party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32 (1940). *See also, Richards v. Jefferson County*, 517 U.S. 793 (1996). This rule, however, is tempered by exceptions, one of which is that "a person who agrees to be bound by the determination of issues in an action

between others is bound in accordance with the terms of his agreement." *Taylor v. Sturgell*, 553 U.S. 880, 893 (2008) (*quoting* Restatement (Second) of Judgments § 40 (1982)). In *Taylor*, this Court reserved the question about the scope of this "agreement," specifically whether and under what circumstances a "nonparty may be bound [by a judgment in litigation to which he was not a party] . . . through conduct inducing reliance on others." *Id.* at 894 n.7. The Sixth Circuit's decision now squarely presents that question for this Court's review.

In the instant case, the Sixth Circuit cited the following "facts" as being sufficient to preclude Loveland from bringing an action to terminate the 1985 Agreement: Loveland's putative knowledge of the previous litigation and consent decrees, Loveland's five-year delay (after the consent decrees were entered) in filing its complaint in state court, the Board's (and other parties to the original litigation) purported reliance on Loveland's silence, and the adverse impact on the consent decrees if Loveland's contact claim was successful.

There are any number of parameters that courts might select from in determining whether a non-party's conduct should preclude it from asserting a claim relating to the subject matter of the action. The Restatement enumerates eight possibilities,[4] and this

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[4] The Restatement lists whether the non-party could have been, or should have been, made a party to the earlier action—which is the procedure the *Wilks* Court suggested the original litigants should have followed to bind the *Wilks* plaintiffs (and thereby preclude the subsequent litigation), whether and to what extent the non-party may be responsible for the fact the earlier action

Court identified two others in *Martin v. Wilks*, 490 U.S. 755 (1989) *superseded by statute on other grounds*, 42 U.S.C. § 2000e-2(n). In *Wilks*, the Court observed, "questions about the adequacy and timeliness of [the non-party's] knowledge [of the previous suit] would inevitably crop up." *Id.* at 768. This case raises two important questions: is reliance-inducing conduct a basis for non-party claim preclusion and, if so, what are the criteria on which the courts should base their decision.

These questions are lurking behind significant numbers of consent decrees, and pose a potential obstacle to myriad persons whose rights are affected by the implementation of those decrees. Until *Wilks*, the ability of such persons to have their own day in court to vindicate their legal rights was, for the most part, summarily denied by the federal courts on the ground that suits by such persons constituted

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went to judgment without the non-party's claim being made known; whether the assertion of the claim will disrupt the resolution of the controversy apparently achieved by the judgment between others; whether the delay by the non-party in asserting its claim would work unjust hardship on a person who has already litigated related issues with another party; whether the non-party's conduct has justifiably led to the supposition that the non-party has no claim or will govern its conduct according to the outcome of the litigation between others, what the relationship is among the parties; whether and to what extent there is an identity of interests between the non-party and the previous litigants, what the purpose and effect was of the prior litigation; and what opportunity and duty the non-party had to clarify any ambiguity about its position. Restatement (Second) of Judgments § 62 (1982).

"impermissible collateral attack[s]" on the decrees.[5] *Id.* at 762. Because of that broad brush, the courts did not need to analyze the circumstances of the individuals who were bringing the suits or the effects of the new litigation on the parties to the decrees to determine whether collateral estoppel should apply, but an examination of those cases reveals that the questions identified in the Restatement and in *Wilks* are present in many of them.[6]

More recently, the Court of Claims interpreted the Court's footnote in *Taylor* as holding that "[t]he party need not have an express agreement to be bound; implied agreement and conduct inducing reliance are also sufficient to constitute an agreement for the purposes of this type of non-party preclusion," and observing that "[t]his type of nonparty preclusion is well-established and is common in the federal courts." *Bartels Trust v. United States*, 88 Fed. Cl. 105, 113 (2009). Thus, the Sixth Circuit's decision, if allowed to stand, will have far-reaching adverse consequences on persons who, although not parties to prior litigation, will be barred from having their own day in court nevertheless. This case presents a dramatic example of why this Court needs to take up the reserved question now.

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[5] *See Wilks*, 490 U.S. at 762 n.3.

[6] *See, e.g , Corley v. Jackson Police Dep't*, 755 F 2d 1207, 1209 (5th Cir. 1985)("[T]o allow plaintiff to attack the decree at this late point would severely undercut important notions of judicial efficiency and finality of judgment, and would unfairly prejudice other parties and nonparties ")

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 10-3116

[Filed September 15, 2010]

UNITED STATES OF AMERICA, *Plaintiff,*	)
BOARD OF COMMISSIONERS OF HAMILTON COUNTY, OHIO, *Plaintiff-Appellee,*	)
CITY OF CINCINNATI, OHIO, *Intervenor Plaintiff-Appellee,*	)
v.	)
CITY OF LOVELAND, OHIO, *Defendant-Appellant.*	)

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.
Nos. 02-00107; 09-00029—S. Arthur Spiegel, District Judge.

Argued: August 6, 2010

Decided and Filed: September 15, 2010

Before: GUY and GRIFFIN, Circuit Judges; HOOD, Senior District Judge.*

COUNSEL

ARGUED: Stephen P. Samuels, SCHOTTENSTEIN, ZOX & DUNN CO., LPA, Columbus, Ohio, for Appellant. Anthony L. Osterlund, VORYS, SATER, SEYMOUR AND PEASE LLP, Cincinnati, Ohio, Louis L. McMahon, McMAHON DeGULIS LLP, Cleveland, Ohio, for Appellees. **ON BRIEF:** Stephen P. Samuels, Alan G. Starkoff, Kevin L. Murch, SCHOTTENSTEIN, ZOX & DUNN CO., LPA, Columbus, Ohio, R. Guy Taft, Joseph J. Braun, STRAUSS & TROY, Cincinnati, Ohio, for Appellant. Anthony L. Osterlund, Mark A. Norman, VORYS, SATER, SEYMOUR AND PEASE LLP, Cincinnati, Ohio, Louis L. McMahon, McMAHON DeGULIS LLP, Cleveland, Ohio, for Appellees.

OPINION

GRIFFIN, Circuit Judge. Defendant City of Loveland appeals the district court's grant of judgment on the pleadings in favor of plaintiff Hamilton County

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* The Honorable Joseph M. Hood, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

Board of Commissioners, effectively preventing Loveland from terminating a 1985 sewage treatment agreement. Loveland argues that the district court lacked subject-matter jurisdiction and erred by granting judgment on the pleadings. We disagree and therefore affirm.

I.

The City of Loveland, Ohio, is located in the greater Cincinnati metropolitan area. In 1970, Loveland put into operation its Polk Run Waste Water Treatment Plant and sewer system (the "Polk Run System" or "Polk Run Segment"), which provides services to residents in three counties, including Hamilton County. Loveland operated the Polk Run System from 1970 until 1985. In 1985, the City of Loveland and the Board of County Commissioners of Hamilton County, Ohio (the "Board") entered into an agreement (the "1985 Agreement") by which the Board, through a separate agreement with the Metropolitan Sewer District of Greater Cincinnati ("MSD"), would "maintain, repair and operate" the Polk Run System. However, Loveland continued to own the "existing facilities and improvements" constituting the Polk Run System as of the execution date of the 1985 Agreement. Pursuant to the 1985 Agreement, "[t]he rates to be billed for sewerage service shall be those rates . . . established by the Board, which rates may be modified by said Board from time to time" and "[t]he rates for sewerage service shall be uniform throughout the service area of the [MSD]."

In 2002, the United States, on behalf of the Environmental Protection Agency, sued the Board and the City of Cincinnati for violations of the Federal

Clean Water Act. *See United States v. Hamilton County Bd. of Comm'rs*, No. 1:02-cv-00107 (S.D. Ohio) (the "consent decree case"). The State of Ohio joined the federal action as a plaintiff, alleging violations of counterpart state laws. The parties entered into a partial settlement, which required the elimination of longstanding and substantial sewage discharge from the MSD-operated sewer system. Thereafter, the Sierra Club sued the Board, claiming that the partial settlement did not satisfactorily address the health and environmental problems caused by the sewer system. In June 2004, the Sierra Club lawsuit and the original lawsuit were resolved by two consent decrees approved by the United States District Court for the Southern District of Ohio (collectively, the "consent decree"). The consent decree requires the Board and the City of Cincinnati to address capacity and pollution problems within the MSD-operated sewer system, which includes the Polk Run Segment, by implementing infrastructure improvements through the year 2022.

The entry of the consent decree was the culmination of lengthy and complicated litigation. The notice of the proposed consent decree, which included an invitation for public comment, was published in *The Federal Register*. Thereafter, the district court reviewed all public comments and held a hearing on the proposed settlement. Following the hearing, the district court entered the consent decree after ruling that the settlement was fair, adequate, and in compliance with the Clean Water Act. Loveland neither participated in the hearing nor submitted objections or comments regarding the proposed settlement. However, as a consequence of the consent decree, new obligations were imposed upon the MSD-

operated sewer system that have resulted in higher rates for all users, including residents of Loveland, whose sewer system has been operated by the Board pursuant to the 1985 Agreement. Under the terms of the consent decree, the district court "retain[ed] jurisdiction to enforce the terms and conditions and achieve the objectives of this Consent Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction, modification, implementation or execution of this Decree."

In October 2008, Loveland sent a notice to the Board indicating its intention to terminate the 1985 Agreement, effective December 31, 2009, and to resume its independent operation of the Polk Run System. Simultaneously, Loveland filed suit in the Clermont County, Ohio, Court of Common Pleas seeking a declaratory judgment, among other things, and eventually asserting a claim for breach of contract. *City of Loveland, Ohio v. Bd. of Comm'rs of Hamilton County, Ohio*, No. 2008 CVH 02199 (C.P. Clermont County, Ohio) (the "state court" action). Loveland's state court complaint alleged that, between 2003 and 2007, the sewer fees charged by the Board grew dramatically, nearly double the State of Ohio average, and would continue to rise because of the funding necessary to comply with the obligations imposed by the consent decree. Loveland also alleged that the increased rates "disproportionately and unfairly overcharged customers" in Loveland because the cost of improvements required for the Polk Run Segment were substantially less than the cost of improvements needed for the other sewer systems in the MSD.

The Board responded by filing the present action in the United States District Court for the Southern District of Ohio, seeking a declaratory judgment that Loveland could not unilaterally terminate the 1985 Agreement and thereby acquire control over the MSD Polk Run Segment. Loveland moved to dismiss the Board's complaint for lack of subject-matter jurisdiction, arguing that it did not raise a federal question and involved only a contract dispute arising under Ohio law. Loveland argued that "any issues related to the reasonableness of the termination of the 1985 Agreement will be addressed by the State Court action," and the federal suit constituted improper "forum shopping." The district court denied the motion to dismiss, ruling that it possessed subject-matter jurisdiction under 28 U.S.C. § 1331, holding that "Loveland's current efforts to modify its relationship with MSD is directly related to its concerns about the implementation of the Consent Decrees" and that the Board "properly selected this forum to seek declaratory judgment . . . ."

Thereafter, the state and federal suits proceeded on parallel tracks. The Board moved to dismiss the state suit, or alternatively, to stay the state action pending the outcome of the federal case. In September 2009, the Ohio Court of Common Pleas granted the Board's motion to dismiss. The state court ruled that Loveland failed to state a claim either for a declaratory judgment or for breach of the 1985 Agreement. It also commented on the Board's alternative request for a stay, stating:

> While the Court is not making a finding on the motion to stay since it is now moot, the Court would note that the issues involved in this case

are exactly the same as those involved in the federal case. The federal court has clearly accepted jurisdiction of Hamilton County's declaratory judgment action since it directly affects the Consent Decrees in the previous case. That declaratory judgment action asks the federal court to resolve the same issue that Loveland is asking this Court to resolve, i.e., whether Loveland can terminate the 1985 agreement and regain control over the Polk Run System. Since both courts are being asked to resolve the same issue, the Court believes that judicial economy and the risk of inconsistent results mandate that only one court determine that issue. The Court further believes that the federal court is in a better position to make that determination since any decision that this Court would make would directly affect the Consent Decrees, over which the federal court has retained jurisdiction. Therefore, since federal consent decrees are at issue, it would make sense to have that court also resolve any issues that have a direct impact on the implementation of those consent decrees.

* * *

Therefore, while not determining the motion to stay, the Court strongly feels that the federal court is currently in a better position to determine those issues that have a direct impact on the Consent Decrees. Had this Court not dismissed the case, it would not have considered the remaining state claims, if any, until the resolution of the current federal action.

Loveland appealed the order of dismissal to the Ohio Court of Appeals, where the appeal remains pending.

In the present case, the district court granted the Board's motion for judgment on the pleadings on January 14, 2010. The court ruled that "Loveland's desire to cancel the 1985 agreement amounts to a collateral attack on the Consent Decree[], to which it never objected in 2004 when it had the opportunity to do so." The district court also noted "without question that Loveland's desire to terminate the 1985 agreement is rooted in the desire to insulate its ratepayers from rate increases due to remediation costs that under the Consent Decree[] will be borne across the MSD system." However, it held that the doctrines of laches and equitable estoppel prevented Loveland's collateral attack on the consent decree because Loveland had constructive notice of the consent decree in 2004 but failed to object or comment, and plaintiffs "have relied upon the assumption that Loveland ratepayers were part of MSD's global system" in "craft[ing] the complex, multi-year infrastructure improvements that have begun the implementation of the remedies required by the Consent Decree[]." Accordingly, the district court granted the Board's motion for judgment on the pleadings; declared that Loveland "shall not be permitted to unilaterally terminate its 1985 agreement with the Board"; and enjoined Loveland "from attempting to modify the Consent Decree in this matter by collateral attack, through termination of the 1985 Agreement or otherwise, while Consent Decree obligations are pending." Loveland timely appeals.

II.

On appeal, Loveland challenges the district court's subject-matter jurisdiction and its grant of judgment on the pleadings. First, Loveland argues that the district court lacked subject-matter jurisdiction over the present action. It contends that the Board's request for declaratory relief involves no federal question because it is a state-law contract dispute in which the Board "is only seeking a determination that Loveland may not unilaterally terminate the 1985 Agreement." (internal quotation marks omitted). In support of this argument, Loveland relies on *City of Warren v. City of Detroit*, 495 F.3d 282 (6th Cir. 2007), which it characterizes as "nearly identical to this case." In *City of Warren*, Warren filed a complaint in the Circuit Court for the County of Macomb, Michigan, alleging that Detroit, which provided Warren's water, breached its contractual obligation to charge "reasonable" rates by raising its rates to pay for costs associated with the obligations it assumed in a consent decree with the EPA; Warren also alleged that Detroit, in so doing, violated Mich. Comp. Laws § 123.141(2), which required water rates to be based on the actual cost of service as determined under the utility basis of rate-making. *Id.* at 284. Warren sought damages for breach of contract, an injunction to prevent Detroit from charging unreasonable rates, and an order requiring Detroit to make an accounting of all factors included in establishing the water rates. *Id.*

Detroit removed the case to the United States District Court for the Eastern District of Michigan, arguing that Warren's action arose under the judgments and orders entered pursuant to the federal Clean Water Act and the federal Clean Air Act in

United States v. City of Detroit, No. 77-71100, 2000 WL 371795 (E.D. Mich. Feb.7, 2000) and that removal was necessary to protect the integrity of the orders in that case. *Id.* at 285. Warren moved to remand to state court. The district court denied Warren's motion, reasoning that the case was properly removed to federal court pursuant to 28 U.S.C. § 1441(b) as arising under federal law because Warren sought relief that had an adverse effect upon or was inconsistent with the federal consent decree. *Id.* On appeal, this court reversed. The *City of Warren* panel noted that "[o]nly state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant," *id.* at 286 (quoting *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987)), and that Warren's action could not have been originally filed in federal court because it stated a contract claim and a claim for violation of state statute, *id.* We also concluded that having an adverse impact on a consent decree was not enough to establish federal question jurisdiction because, under that logic, "a slip-and-fall case would be removable to federal court because a damage award would affect DWSD's finances and consequently its ability to comply with the consent judgment, a result that would abrogate the well-pleaded complaint rule set forth in *Caterpillar* and *Franchise Tax Board*." *Id.*

The *City of Warren* panel concluded that there was no substantial federal question jurisdiction because "Warren's contract claim alleges that Detroit has included certain costs in the water rates that are not reasonable, as required by the contract" and "Warren's statutory claim alleges that Detroit has included costs in the water rates that are not included in the actual cost of service as determined under the utility basis of

rate-making, as required by Michigan statute." *Id.* at 287. It explained that "[n]either of these claims raises a question of federal law because the consent judgments entered in the EPA case lack the power to supersede Warren's contractual rights or the Michigan statute." *Id.* at 287. Finally, the court considered whether Warren's claim was "really" one of federal law, i.e., an attempt "to defeat removal by omitting to plead necessary federal questions in a complaint," and it concluded that it was not. *Id.* (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 22 (1983)). The reason, the court explained, was that there was "no allegation that Warren's claims are identical to federal claims, or are completely preempted by federal law . . ." *Id.* at 287.

We find *City of Warren* distinguishable. Here, in contrast to *City of Warren*, the Board's complaint neither asks the court to interpret the terms of the contract nor alleges a violation of a state statute; rather, the Board seeks a determination that Loveland may not terminate the 1985 Agreement in its entirety because of the consent decree. Moreover, this case involves more than simply the economic consequence of the consent decree on non-parties; it involves the attempted removal of property, the Polk Run Segment, from the consent decree obligations. *Cf. Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 33-34 (2002), *overruling Bylinski v. City of Allen Park*, 169 F.3d 1001, 1002-03 (6th Cir.1999) (holding that there was jurisdiction since suit "pose[d] an imminent threat to the integrity of the [orders] because it could *adversely affect the financing mechanism* in those orders") (emphasis added).

To be sure, Loveland was not a party to the consent decree. However, it cannot escape the district court's jurisdiction over its consent decree through artful pleading and argument. Whether Loveland may terminate the 1985 Agreement and escape the financial impact of the consent decree as a non-party is an issue to be resolved on the merits rather than by a challenge to the district court's jurisdiction. Unlike *City of Warren*, which was a removal case for which federal question jurisdiction under the well-pleaded complaint rule was determined by reference to Warren's state court complaint, jurisdiction in this case is based on the Board's federal complaint for declaratory judgment which requests that the district court enforce its consent decree. Because the district court retains jurisdiction to police its consent decrees, *Waste Mgmt. of Ohio, Inc. v. City of Dayton*, 132 F.3d 1142, 1144-46 (6th Cir. 1997), we hold that the Board's complaint presents a federal question.

Furthermore, subject-matter jurisdiction properly lies under the substantial federal question doctrine. In *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 568 (6th Cir. 2007) (en banc) (citing *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005)), this court explained that a federal court has subject-matter jurisdiction where: "(1) the state-law claim . . . necessarily raise[s] a disputed federal issue; (2) the federal interest in the issue [is] substantial; and (3) the exercise of jurisdiction [does] not disturb any congressionally approved balance of federal and state judicial responsibilities." This case satisfies all three criteria. The first factor is met because, insofar as this declaratory judgment action is the inverse of Loveland's state law claim, it necessarily raises a disputed federal issue: whether the federal Clean

Water Act consent decree requiring upgrades to the Polk Run Segment can be modified by removal of that portion of the sewer system from the consent decree obligations. Because the consent decree applies to the Polk Run Segment, it is impossible to resolve Loveland's request to terminate the 1985 Agreement and the Board's request for declaratory relief without analyzing and interpreting the consent decree.

The second factor regards the substantiality of the federal interest. In making this determination, we consider whether: (1) the case includes a federal agency; (2) the federal question is important; (3) the decision on the federal question will resolve the case; and (4) the decision will affect other cases. *Mikulski*, 501 F.3d at 570 (citation omitted). Here, there is a substantial federal interest because (1) federal agencies negotiated the consent decree upgrades to the Polk Run System; (2) the consent decree was and is intended to comply with a federal statute and impacts thousands of ratepayers throughout the Cincinnati metropolitan area; (3) the resolution of Loveland's obligations, if any, under the consent decree will resolve the case because whether Loveland may terminate the 1985 Agreement or terminate or modify its obligations under the consent decree are dispositive, not incidental, issues; and (4) the decision on the federal question will have a broad impact because, depending on the outcome of this litigation, other entities may seek to circumvent consent agreements entered into between the federal government and cities around the nation to enforce the Clean Water Act.

Finally, under the last prong of the substantial federal question inquiry, we must "inquire into the

risk of upsetting the intended balance by opening the federal courts to an undesirable quantity of litigation." *Mikulski*, 501 F.3d at 573. In the present case, the district court's exercise of jurisdiction does not disturb any congressionally approved balance of federal and state judicial responsibilities. Because federal courts are already charged with enforcing the Clean Water Act, and federal consent decrees, by definition, stem from a matter already within the court's jurisdiction, the district court's exercise of jurisdiction over this matter would not open the floodgates of litigation that might overwhelm the federal courts. Indeed, a contrary holding that the district court lacks jurisdiction could allow litigants to use the state courts as a vehicle to undermine a federal court's ability to police its consent decrees when the state-court action is, in Loveland's words, "the exact inverse" of the federal court action. Moreover, at this juncture, the state court action has been dismissed, although the judgment has been appealed. As the state court explained when it dismissed Loveland's complaint:

> "[T]he federal court is in a better position to [decide the issues here] since any decision that this Court would make would directly affect the Consent Decrees, over which the federal court has retained jurisdiction. Therefore, since federal consent decrees are at issue, it would make sense to have that court also resolve any issues that have a direct impact on the implementation of those consent decrees."

For these reasons, we hold that the district court properly exercised subject-matter jurisdiction.[1]

III.

Next, Loveland argues that the district court erred in granting the Board's motion for judgment on the pleadings. Loveland asserts that it was not a party to the consent decree and accordingly is not bound by it. Further, it claims that the doctrines of laches and equitable estoppel are "fact intensive" inquiries inappropriate for disposition on the pleadings, and such defenses are state law affirmative defenses more properly asserted in a state action.

We review a district court's grant of judgment on the pleadings under Rule 12(c) using the same de novo standard of review applicable to orders of dismissal under Rule 12(b)(6). *Tucker v. Middleburg-Legacy Place*, 539 F.3d 545, 549 (6th Cir. 2008). "For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *Id.* (quoting *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007)). In this circuit, laches is "a negligent and unintentional failure to protect one's

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[1] Loveland also argues that the All Writs Act, 28 U.S.C. § 1651, and the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 & 2202, did not confer jurisdiction upon the district court. In view of our disposition of the case, and because we do not read the district court's opinion to rely on the All Writs Act or the Federal Declaratory Judgment Act as a basis for *subject-matter* jurisdiction, we find it unnecessary to address these issues.

rights." *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991). "A party asserting laches must show: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it." *Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc.*, 270 F.3d 298, 320 (6th Cir. 2001). Equitable estoppel requires a showing that there was: "(1) [a] misrepresentation by the party against whom estoppel is asserted; (2) reasonable reliance on the misrepresentation by the party asserting estoppel; and (3) [a] detriment to the party asserting estoppel." *Premo v. United States*, 599 F.3d 540, 547 (6th Cir. 2010).

In this case, the district court ruled that judgment on the pleadings was warranted in favor of the Board because the doctrines of laches and equitable estoppel barred Loveland from challenging the effects of the consent decree. The court explained that Loveland "has proffered no evidence demonstrating excusable delay in asserting its claim, beyond attempting to argue it lacked notice, while as a matter of law, publication in the Federal Register constituted notice." *United States v. Bd. of County Comm'rs of Hamilton County, Ohio*, Nos. 1:02-CV-00107, 1:09-CV-00029, 2010 WL 200326, at *5 (S.D. Ohio Jan. 14, 2010) (citations omitted). It also concluded that

> "[t]he parties to the Consent Decrees reasonably relied on Loveland's silence as they crafted the complex, multiyear infrastructure improvements that have begun the implementation of the remedies required by the Consent Decrees . . . . [and that] Loveland's silence . . . misled Defendants into relying on Loveland's participation in the global remedies called for by

> the Consent Decrees, the Court finds Loveland should be equitably estopped from withdrawing from MSD until after full implementation of the Consent Decrees."

Id. Accordingly, the district court found that an injunction was necessary because "inequity would result if Loveland were permitted to enforce its now-stale claim to terminate the 1985 agreement as such termination would affect the implementation of the Consent Decrees." *Id.* We agree.

Loveland's contention that it is not bound by the consent decree, while accurate, is immaterial. For the reasons detailed by the district court, Loveland forfeited its rights to contest the effects of the consent decree by unreasonably sitting on its rights. Loveland's actions of not objecting to the proposed consent decree, declining to participate in the pre-approval hearings, and allowing the expansion of the MSD Polk Run Segment while obtaining its benefits for four years, weigh heavily against Loveland's claim of relief. Loveland's additional argument that the district court erred in granting judgment on the pleadings because laches and equitable estoppel are usually "fact intensive" inquiries, *see, e.g.*, *Kourtis v. Cameron*, 419 F.3d 989 (9th Cir. 2005) (overruled on other grounds); *Axcan Scandipharm Inc. v. Ethex Corp.*, 585 F. Supp. 2d 1067 (D. Minn. 2007), is similarly unpersuasive. Here, there was no need for discovery, let alone a trial, because it is undisputed that Loveland had constructive notice of the proposed consent decree, waited five years to bring its claim, and prejudiced the Board by its delay.

Finally, Loveland asserts that laches and equitable estoppel are affirmative defenses under state law that the Board should assert in a state action. Assuming *arguendo* that laches and equitable estoppel are state-law affirmative defenses, Loveland has failed to successfully challenge the federal judgment at issue. The state court action was dismissed in favor of the Board. Our review is not of the state court judgment, but of the district court's judgment. For purposes of our review, the defenses of laches and equitable estoppel were properly raised by the Board and ruled upon by the district court.

IV.

For these reasons, we affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 10-3116

[Filed September 15, 2010]

UNITED STATES OF AMERICA, Plaintiff,	)
BOARD OF COMMISSIONERS OF HAMILTON COUNTY, OHIO, Plaintiff - Appellee,	)
CITY OF CINCINNATI, OHIO, Intervenor Plaintiff - Appellee,	)
v.	)
CITY OF LOVELAND, OHIO, Defendant - Appellant.	)

Before: GUY and GRIFFIN, Circuit Judges; HOOD, Senior District Judge.

JUDGMENT

On Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed January 14, 2010]

NO. 1:02-CV-00107 / NO. 1:09-CV-00029

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO, et al.,

Defendants.

BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO,

Plaintiff,

v.

CITY OF LOVELAND, OHIO, et al.,

Defendants.

OPINION AND ORDER

This matter is before the Court on the Board of Commissioners of Hamilton County Ohio (the "Board") and the City of Cincinnati's ("Cincinnati") Motion for Judgment on the Pleadings in Case No. 1:09-CV-0029 (doc. 373), Defendant City of Loveland's ("Loveland") Response in Opposition (doc. 390), and the Plaintiffs' Reply (doc. 392). Also before the Court is the Board's Motion for a Protective Order Staying Discovery Pending a Decision on the Board's Motion for Judgment on the Pleadings and Motion to Amend Pretrial Schedule (doc. 386), Cincinnati's parallel motion (doc. 387), Loveland's Response in Oppostion (doc. 391), and the Plaintiffs' Replies (docs. 393, 394). For the reasons indicated herein, the Court GRANTS Plaintiffs' Motion for Judgment on the Pleadings and ENJOINS Defendant City of Loveland from attempting to modify the Consent Decree in this matter by collateral attack, through termination of the 1985 Agreement or otherwise, while Consent Decree obligations are pending. The Court further DENIES as MOOT the Plaintiffs' Motions for Stay because its judgment on the pleadings terminates the Loveland matter, NO. 1:09-CV-00029, completely.

I. Background

On June 9, 2004, the Court entered Consent Decrees[1] in United States v. Board, Case No.

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[1] The Court entered two decrees: 1) the Consent Decree on Combined Sewer Overflows, Wastewater Treatment Plants and Implementation Capacity Assurance Plan for Sanitary Sewer Overflows, and 2) the Interim Partial Consent Decree on Sanitary

1:02-CV-00107, (the "sewer" case), which set in place a framework for insuring that Defendants in such case, the Board, Cincinnati, and the Metropolitan Sewer District of Greater Cincinnati ("MSD"), address capacity and pollution problems with their sewer system, through the implementation of infrastructure improvements through the year 2022 (docs. 129, 130, 131). The entry of the Consent Decrees came after a long process, that included notification about the Decrees by the United States through publication in the The Federal Register, which solicited public comment (doc. 129). After the Court reviewed all comments, it conducted a hearing on the Consent Decrees, finding them fair, adequate, and in compliance with the Clean Water Act (Id.).

Defendants' sewer system currently includes the Polk Run Waste Water Treatment Plant and Loveland Service Area, which by a 1985 agreement with the Board was consolidated into the MSD, modernized and enlarged, and which is now known as the "MSD Polk Run Segment" (doc. 343). There is no dispute that the MSD Polk Run Segment is subject to the Consent Decrees' mandated improvements and repairs (Id.). On October 29, 2008, the City of Loveland filed a Complaint in the Clermont County Court of Common Pleas, in which it alleged that compliance with the Decrees will result in increased rates for all users (Id.). Loveland sought declaratory judgment sanctioning termination of the 1985 agreement, as well as the grant of easements to the extent necessary such that it could operate the Polk Run Segment (Id.).

Sewer Overflows. The Court uses the terms "Consent Decree" and "Consent Decrees" interchangeably within this Order.

On January 14, 2009, the Board brought suit in this Court, Case No. 1:09-CV-00029, (the "Loveland" case), seeking declaratory judgment on the issue of whether Loveland could secede from the MSD and obtain the Board's interest in property subject to the Consent Decree. The Court consolidated the Loveland case and the sewer case on June 3, 2009, finding that Loveland was "seeking to gain control over assets directly involved in the Consent Decrees" (doc. 354). On September 28, 2009, the Clermont County Court of Common Pleas dismissed Loveland's state court action, holding that Loveland had failed to state a claim for breach of the 1985 agreement, and that because Loveland's action directly affected the Consent Decrees, judicial economy and the risk of inconsistent results mandated that only one court rule on the matter (doc. 386).

On September 14, 2009, the Board and Cincinnati filed the instant motion for judgment on the pleadings in Case No. 1:09-CV-00029, arguing that because Loveland failed to object to the Consent Decrees during the 2004 public comment period, it should be enjoined from attempting to modify the Decrees by removing its ratepayers from overall Consent Decree obligations (doc. 373). Loveland has responded (doc. 390), and the Board and Cincinnati have replied (doc. 392), such that this matter is ripe for the Court's consideration.

II. Applicable Legal Standard

The Court may grant a party's motion for judgment on the pleadings under Federal Rule 12(c) if it determines that the moving party is entitled to judgment as a matter of law. In arriving at such

determination, "all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." Tucker v. Middleburg-Legacy Place, 539 F 3d 545, 549 (6th Cir. 2008). In its evaluation, the Court may consider the "pleadings, which consist of the complaint, the answer, and any written instruments attached as exhibits." Felix v. Dow Chemical Co., No. 2:07-CV-971, 2008 WL 207857, *1 (S.D. Ohio Jan. 23, 2008). The Court may also "consider materials in addition to the pleadings without converting the motion to one for summary judgment if the materials are public records or are otherwise appropriate for the taking of judicial notice." Id. at *1.

III. Analysis

Movants contend that Loveland's present attempt to terminate the 1985 agreement between it and the Board is nothing but a collateral attack on the Consent Decrees so as to avoid the obligations of such Decrees (doc. 373). Citing Loveland's state court Complaint, Movants contend Loveland's stated goal is to avoid rate increases made necessary by the Board's obligations under the Consent Decrees, by terminating the 1985 agreement (Id.). Movants further contend Loveland failed to submit public comments in 2004 regarding the Consent Decrees, nor did it participate, file any submissions, or appear at the Court's May 2004 hearing regarding entry of the Consent Decree (Id.). In Movants' view, there is no question based on Loveland's state court complaint, and further, based on its public statements, of its intention to extract a portion of MSD from the Board's unified efforts to

comply with the Consent Decrees (Id.). If Loveland would be allowed to terminate the 1985 agreement, argue Movants, then there would be less money available for MSD operations and Consent Decree projects, which would likely result in undesired extensions to completion of such projects (Id.). Therefore, argue movants, the Court should issue an Order, based on the Consent Decrees, the pleadings in this matter, and the doctrines of laches and estoppel, declaring that Loveland cannot modify the Consent Decrees by terminating the 1985 agreement, or otherwise, while the Consent Decrees are pending (Id.).

Movants argue that by its express terms, the Consent Decrees do not allow modification by a non-party, and there is no dispute that Loveland is not a party to such Decrees (Id.). They also contend that because any termination of the 1985 agreement would cause a change in "interest in or operating role with response to" the MSD Polk Run Segment, the Consent Decrees would necessarily require modification so as to make Loveland a party subject to Consent Decree requirements (Id.). Because none of the current parties to the Consent Decrees are seeking to modify the Consent Decrees in the manner that Loveland seeks, and because Loveland is not a party to such Decrees, Movants argue Loveland should not be able to force any modification during the pendency of the Decrees (Id.).

Movants argue their position is supported by the doctrine of laches, as Loveland "sat silently for nearly five years," while the Board and Cincinnati made substantial commitments to develop and implement measures to ensure compliance with the Decrees (Id.).

In movants' view, "a party may not, by silence, create an impression of acquiescence that leads others to make substantial commitments" (Id. quoting Hadix v. Johnson, 66 F.3d 325 (6th Cir. 1995). Similarly, movants argue that Loveland's silence during the notice and public comment period should give rise to equitable estoppel barring Loveland from terminating the 1985 agreement (Id. citing Great North Savings Co. v. Ingarra, 66 Ohio St. 2d 503 (1981), First Federal Sav. & Loan Ass'n of Toledo v. Perry's Landing, Inc., 463 N.E. 2d 636, 647 (Ohio Ct. App. 1983)).

Loveland responds that though it does not dispute that it did not make any formal objection to the Consent Decree, that fact alone should not preclude it from terminating the 1985 agreement and resuming control of the sewage plant, which it owns (doc. 390). Loveland argues there is no evidence in the record contradicting its assertion that it will do everything required by the Consent Decree, including becoming a party thereto (Id.).

Loveland argues movants make numerous statements of purported fact that are unsupported by the record, including that Loveland seeks to modify the Consent Decree, carve out MSD ratepayers, and that Loveland received notice of the Consent Decree (Id.). Loveland contends the movants merely conjecture about what "may" or "might" happen in the future such that they are not entitled to judgment as a matter of law (Id.).

Loveland states it is not seeking to modify the Consent Decrees, but that it "will voluntarily become party to the Consent Decree. . .and [it] will satisfy any and all obligations related to the Polk Run Plant and

the Polk Run System" (Id.). Loveland argues the terms of the Consent Decree allows for a successor-in-interest, a role that it could take in assuming Polk Run obligations (Id.).

Loveland argues movants improperly invoke the doctrine of laches, as there is no authority supporting movants' contention that Loveland may not terminate a private contractual agreement like the 1985 agreement due to a failure to comment on the Consent Decrees (Id.). Loveland argues there is no evidence it was aware of the Federal Register notice, and in any event, such notice provided only a general overview of the history leading up to the Decree and contract information for any comments (Id.).

Even if the doctrine of laches applies, Loveland contends, the Court would have to resolve factual issues regarding the requisite "proof of lack of diligence," on Loveland's part (Id.). Moreover, argues Loveland, it should be given the opportunity to explain why it did not participate in the public comment period in 2004 (Id.).

As for equitable estoppel, Loveland similarly argues that several issues of fact preclude judgment on the pleadings (Id.). Loveland contends that the issue of movants' reliance on Loveland's lack of objection is an issue of fact (Id.). Loveland reiterates its position that there is no evidence it had notice of the Consent Decree (Id.). In any event, Loveland argues the comment period in 2004 should not be considered the time-frame for notice, as the parties to the Consent Decree did not file until June 8, 2009, the Wet Weather Improvement Plan, which details the projects to be performed, the schedule, and the costs (Id.).

Movants reply that Loveland does not dispute any material fact set forth in the Complaint (doc. 392). As Movants see it, there is no dispute that the Polk Run Plant and Segment are part of the Consent Decree, that Notice of the Consent Decree was provided in the Federal Register, that Loveland submitted no comments nor participated in the Court's hearing on the motion for entry of the Consent Decree, and that Loveland is now trying to terminate the 1985 agreement so as to remove its ratepayers and insulate them from planned rate increases resulting from the Consent Decrees (Id.). Movants further argue there is no dispute that Loveland is not party to the Consent Decree, that any change of interest or operating role with regard to the Polk Run Plant/Segment would be governed by the Consent Decree and would require modification thereof, and that no party to the Consent Decree has moved to modify the Consent Decree (Id.).

Movants argue that Loveland attempts to manufacture factual disputes that are all simply immaterial to the question of whether Loveland, which failed to object during the Consent Decree comment period, can terminate the 1985 agreement and require modification of the Consent Decree (Id.). Movants argue the doctrine of laches is indeed applicable to this case, as laches is "the neglect to assert a right or a claim," something which Loveland failed to timely accomplish in failing to assert its claimed right to terminate the 1985 agreement (Id. quoting Kansas v. Colorado, 514 U.S. 673, 687 (1985)). Movants further argue that Loveland's contention regarding a lack of evidence that it received notice of the Consent Decrees falls flat because publication of such notice in the Federal Register constitutes notice as a matter of law (Id. citing 44 U.S.C. § 1507, Wolfson v. United States,

204 Ct. Cl. 83, 492 F.2d 1386, 1392 (1974)(publication in the Federal Register provides legal notice of an action to all who may be affected thereby)). Movants argue they have performed substantial Consent Decree duties, over the course of five years, based on the assumption that the Polk Run Plant and Segment would be part of MSD, and that the resulting revenues would be available to help fund the Consent Decree-required capital improvements (Id.). Movants argue that allowing Loveland to raise its asserted contract rights at this point would be extraordinarily prejudicial (Id.).

Having reviewed this matter, the Court finds movants' position well-taken that Loveland's desire to cancel the 1985 agreement amounts to a collateral attack on the Consent Decrees, to which it never objected in 2004 when it had the opportunity to do so. The Court therefore finds the doctrines of laches and of equitable estoppel applicable to this case, for all of the reasons articulated by movants. Even the sewer case Plaintiff, the United States, when the Court was considering consolidation of the sewer case with the Loveland matter, stated "the regulators believe that the appropriate time for Loveland to have raised these issues was during the consent decree negotiation process, or at least during one of the two public notice and comment periods for the decrees. Yet Loveland did not" (doc. 346, fn. 1).

Although Loveland is correct that the Consent Decree envisioned the possibility of successors-in-interest to the Board, it is not correct that any non-party could acquire such an interest without the consent or action of a party to the Decree. Here, no

party to the Consent Decree seeks the changes proposed by Loveland.

The Court finds without question that Loveland's desire to terminate the 1985 agreement is rooted in the desire to insulate its ratepayers from rate increases due to remediation costs that under the Consent Decrees will be borne across the MSD system. Loveland's state court complaint and its public statements, of which the Court takes judicial notice, establish as much. Even Loveland's statement that it has no intent to modify the Consent Decree rings hollow because although it states it "will satisfy any and all obligations related to the Polk Run Plant and the Polk Run System," its current obligations under the Consent Decree, which were forseeable in 2004, are larger. The Court finds no genuine dispute that Defendants in the sewer case have relied upon the assumption that Loveland ratepayers were part of MSD's global system. It is further without question that as a matter of law, Loveland had notice of the Consent Decrees in 2004, but failed to comment or participate at such time. Under these circumstances, the Court finds movants entitled to declaratory judgment as a matter of law, barring Loveland from seeking to terminate the 1985 agreement or in any other way modifying the Consent Decrees, during their pendency.

IV. Conclusion

The Court finds that even while taking Loveland's arguments as true, the movants in this matter are entitled to judgment on their pleadings. Inequity would result if Loveland were permitted to enforce its now-stale claim to terminate the 1985 agreement as

such termination would affect the implementation of the Consent Decrees. Loveland has proffered no evidence demonstrating excusable delay in asserting its claim, beyond attempting to argue it lacked notice, while as a matter of law, publication in the Federal Register constituted notice. 44 U.S.C. § 1507, Wolfson v. United States, 204 Ct. Cl. 83, 492 F.2d 1386, 1392 (1974). Loveland had notice of the Consent Decrees in 2004 and did nothing. The parties to the Consent Decrees reasonably relied on Loveland's silence as they crafted the complex, multiyear infrastructure improvements that have begun the implementation of the remedies required by the Consent Decrees. As such, doctrine of laches applies to this matter. Gardner v. Panama R.R. Co., 342 U.S. 29, 30-31 (1951). For the same reasons, especially Loveland's silence that innocently misled Defendants into relying on Loveland's participation in the global remedies called for by the Consent Decrees, the Court finds Loveland should be equitably estopped from withdrawing from MSD until after full implementation of the Consent Decrees. First Federal Sav. & Loan Ass'n of Toledo v. Perry's Landing, Inc., 463 N.E. 2d 636, 647 (Ohio Ct. App. 1983).

Accordingly, the Court GRANTS the Board of Commissioners of Hamilton County Ohio and the City of Cincinnati's Motion for Judgment on the Pleadings in Case No. 1:09-CV-0029 (doc. 373), DECLARES that the Defendant City of Loveland shall not be permitted to unilaterally terminate its 1985 agreement with the Board, and ENJOINS the City of Loveland from attempting to modify the Consent Decree in this matter by collateral attack, through termination of the 1985 Agreement or otherwise, while Consent Decree obligations are pending. The Court further DENIES as

MOOT the Plaintiffs' Motions for Stay (docs. 386, 387) because its judgment on the pleadings terminates the Loveland matter, NO. 1:09-CV-00029, completely. The Clerk is directed to dismiss Case No. 1:09-CV-0029 from the Court's docket.

SO ORDERED.

Dated: January 13, 2010 s/S. Arthur Spiegel
S. Arthur Spiegel
United States
Senior District Judge

AO450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Case Number: 1:09-CV-000029

[Filed January 14, 2010]

BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO,	)
Plaintiff	)
V.	)
CITY OF LOVELAND, OHIO, et al.,	)
Defendants.	)

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☑ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

...the Court GRANTS the Board of Commissioners of Hamilton County Ohio and the City of Cincinnati's Motion for Judgment on the Pleadings in Case No.

1:09-CV-0029 (doc. 373 in Case No. 1:02-cv-00107), DECLARES that the Defendant City of Loveland shall not be permitted to unilaterally terminate its 1985 agreement with the Board, and ENJOINS the City of Loveland from attempting to modify the Consent Decree in this matter by collateral attack, through termination of the 1985 Agreement or otherwise, while Consent Decree obligations are pending. The Court further DENIES as MOOT the Plaintiffs' Motions for Stay (docs. 386 and 387 in Case No. 1:02-cv-00107) because its judgment on the pleadings terminates the Loveland matter, NO. 1:09-CV-00029, completely. The Clerk is directed to dismiss Case No. 1:09-CV-0029 from the Court's docket.

1/14/2010
Date

JAMES BONINI, CLERK
Clerk

s/ Kevin Moser
(By) Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 10-3116

[Filed October 27, 2010]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
BOARD OF COMMISSIONERS OF HAMILTON COUNTY, OHIO,	)
	)
Plaintiff-Appellee,	)
	)
CITY OF CINCINNATI, OHIO,	)
	)
Intervenor Plaintiff-Appellee,	)
	)
v.	)
	)
CITY OF LOVELAND, OHIO,	)
	)
Defendant-Appellant.	)
	)

ORDER

BEFORE: GUY and GRIFFIN, Circuit Judges; and HOOD, District Judge.*

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel. The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

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* Hon. Joseph M Hood, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

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(3)

Supreme Court, U.S.
FILED
MAR 30 2011
OFFICE OF THE CLERK

No. 10-965

IN THE

Supreme Court of the United States

CITY OF LOVELAND, OHIO,

Petitioner,

v.

BOARD OF COMMISSIONERS OF HAMILTON COUNTY, OHIO, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether enforcement and/or modification of a Clean Water Act consent decree should be determined by the federal court having original and continuing jurisdiction over that decree and the sewer system that is the subject of the decree.

Whether a substantial federal question is raised where there is a dispute as to whether or how a federal Clean Water Act consent decree to which the United States is a party and the primary plaintiff, can be modified.

Whether a federal court correctly exercises jurisdiction over a federal consent decree matter when: (a) the state trial court dismisses the state court action on substantive grounds and, in so doing, determines that the federal court has prior and primary jurisdiction over the underlying dispute and; (b) the federal court is presented with an original action asking it to enforce a federal consent decree.

Whether this Court should grant review to decide a fact intense issue not yet addressed by another court: whether a non-party to a federal Clean Water Act consent decree, who, despite notice, chose not to object to the consent decree or to even participate in the underlying consent decree case, while accepting the benefits of the consent decree and consolidated sewer district for many years, may be enjoined from attempting to modify the consent decree while its obligations are pending.

Whether a state court litigant, seeking to modify a federal Clean Water Act consent decree, may evade determination of the action by the federal court with original and continuing jurisdiction over the decree by failing to name the United States as a defendant in the state court action.

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Interim Partial Consent Decree on Sanitary Sewer Overflows, *United States of America v. The Board of County Commissioners of Hamilton County, Ohio, et. al.*, United States District Court, Southern District of Ohio, Case No. C-1-02-107 (Jun. 4, 2004) ..... *passim*

INTRODUCTION

More than a quarter century ago, Petitioner City of Loveland ("Loveland") consolidated its municipal sewer system into a larger, county sewer district created by the Respondent Board of Commissioners of Hamilton County, Ohio ("Board"). Ratepayers across the county system then paid for a massive upgrade to the small Loveland plant and added sewers to many adjoining jurisdictions, fostering much population growth in that part of the County. Nearly seven years ago, after two rounds of court hearings, more than two years of litigation, and public notice, the county sewer district (including all of its sewer plants and systems, such as those located in and around Loveland), became subject to a federal Clean Water Act consent decree. Two years ago, through an action filed in state court, Loveland effectively sought to "unconsolidate" itself from the county sewer district, and in the process, modify the consent decree to take control of property, sewer lines, appurtenances, and ratepayers[1] far outside of its municipal jurisdiction. While Loveland says its state court action—which was dismissed by the state trial court that heard it—is grounded solely in state law,[2] the federal trial and appellate courts below pierced through that

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1. Loveland admitted, by public statement, that it was seeking to exercise control over 40,000 ratepayers, a number that is nearly 3.5 times larger than Loveland's population.

2. Even the Clermont County, Ohio Court of Common Pleas understood the speciousness of this claim as it dismissed Loveland's state court complaint for failure to state a claim. It granted the Board's motion to dismiss, in a 20-page Decision/Entry, after the filing of an amended complaint, full briefing, and oral argument. (Pet. App. 6a.)

facade; both found that Loveland's state court "collateral attack" was an attempt to modify the consent decree.

The only court that should determine whether a litigant can modify a federal Clean Water Act consent decree is the federal court with continuing jurisdiction over that decree. Four separate federal judges, with a combined 123 years on the bench, performed independent reviews of this matter and reached the same conclusion. Further, not a single member of the court of appeals voted to grant Loveland's request for *en banc* review of the decision below.

The Sixth Circuit applied this Court's precedent to the facts. It found federal jurisdiction: (1) because the case is based on the Board's federal declaratory judgment complaint which asked the district court to enforce its consent decree; and (2) because jurisdiction properly lies under the substantial federal question doctrine. The decision below does not conflict with a decision of this Court or other circuit court on the same matter. It certainly does not present an important issue of unsettled federal law.

There is no federal jurisdiction issue because no federal court interpreted a state law contract or addressed the merits of Loveland's alleged state law claim. In fact, a state trial court dismissed Loveland's state complaint for failure to state a claim and declared that the federal court was in a better position to determine whether Loveland could modify the federal Clean Water Act consent decree by taking control over real and personal property subject to the decree. The state court action is currently on appeal,

and is stayed at Loveland's request. A decision affirming the state trial court would seem to moot this petition.

With its Petition, Loveland invites new consent decree law: the wholesale opening and revision of ongoing federal consent decrees by modification through state court litigation. Federal consent decrees cover a wide range of federal statutory matters and federal courts typically retain jurisdiction over the implementation and modification of these decrees. Yet, Loveland is essentially asking this Court to allow state courts across the country to modify federal consent decrees—without the United States being a participant to the actions.

Ironically, Loveland accuses the federal courts of "hijacking" a state court case and allowing an "end run" around removal jurisdiction, when that is exactly what Loveland sought to do with its action.[3] There is no applicable "circuit-split" or manifest injustice created by Loveland's defeats in multiple forums. The jurisdictional rules are clear; Petitioner's arguments run afoul of clearly articulated and well settled legal principles. The Petition should be denied.

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3. (Pet. 14, 16.) Loveland is located in multiple Ohio counties. It filed its state court action to modify the federal consent decree in the county where the smallest fraction of its citizens reside, rather than in federal court or the county where the overwhelming majority of its population is located. The real "end run" here was Loveland's attempt to avoid the federal court's continuing jurisdiction over its Clean Water Act consent decree by seeking to modify that decree in state court.

STATEMENT OF THE CASE

The Loveland City System Became a Regional System.

In 1968 the Board reorganized its county-wide Sewer District No. 1 which encompassed the far reaches of Hamilton County under the new name of Metropolitan Sewer District of Greater Cincinnati (MSD). The MSD includes numerous participating political subdivisions surrounding the Cincinnati area, and encompasses hundreds of miles of sewers and numerous major treatment works throughout Hamilton County.

Loveland placed its Polk Run wastewater treatment plant and sewers (collectively the "Old City System") into service in roughly 1970. (Pet. App. 3a.) In 1985, Loveland passed ordinances to join Hamilton County's Sewer District and to turn the use, maintenance, and operation of its Old City System over to MSD. Loveland and the Board entered into an agreement (the "1985 Agreement") pursuant to which the Board agreed to maintain, repair and operate the existing Old City System as part of the MSD. (*Id.*) Over the next 25 years, the Board and its ratepayers transformed the Old City System into a modern and significantly larger regional sewerage area and system that became a part of the MSD (the "MSD Polk Run Segment"). (Pet. App. 25a.) As a result, thousands of customers in MSD territory *outside* of Loveland's corporate limits were added to the MSD customer base and MSD's Polk Run Segment. (Pet. App. at 23a.) The 1985 Agreement contains no termination provision.

The Consent Decree and Loveland's Lack of Objections Thereto.

The United States and others filed suit against the Board and the City of Cincinnati for alleged Clean Water Act, 33 U.S.C. §§ 1251-1387, violations in 2002 (the "Consent Decree Case"). (Pet. App. 3a-4a.) Before entry of the decree, the District Court set a fairness hearing and directed the United States to publish notice in *The Federal Register*, 68 Fed. Reg. 68651-02 (Dec. 9, 2003), to permit a 30-day period for public comment. (Pet. App. 4a.) Loveland did not submit a comment or participate at the fairness hearing. (*Id.*) Notably, objections were filed by The Sierra Club and several individuals, with resulting decree negotiations. (Dist. Ct. ECF Doc. Nos. 114-115.) The action was resolved by two consent decrees (collectively, "Consent Decree") in 2004. (Pet. App. 22a-22b.)

The Consent Decree materially impacted miles of sewers and sewer appurtenances throughout the MSD Hamilton County territory, including the Loveland area, and contemplates years of complex remedial actions involving all sewer systems under MSD control (including Loveland sewers) to be shouldered by all MSD's ratepayers primarily through uniform sewer rates throughout the MSD.

The Consent Decree Encompasses the Polk Run Plant and MSD Polk Run Segment.

The Polk Run Plant and MSD Polk Run Segment are part of the Consent Decree's definition of "Sewer System," which is the very subject of the Consent Decree. (Dist. Ct. ECF Doc. Nos. 1 and 363, at ¶ 4.) The Consent Decree

governs any change to the Board's Sewer Systems. (Dist. Ct. ECF Doc. No. 131, §§ I, III.)

Consent Decree Modification and the District Court's Continuing Jurisdiction.

The District Court retained jurisdiction over the terms and enforcement of the Consent Decree. Specifically, the Consent Decree provides that:

> The [U.S. District Court for the Southern District of Ohio] shall retain jurisdiction to enforce the terms and conditions and achieve the objectives of this Consent Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction, modification, implementation or execution of this Decree. (Pet. App. 5a.)

The Consent Decree can be modified only if all parties to the decree agree, or on the successful 60(b) motion of the Board or Cincinnati. (Pet. App. 26a, 30a-31a.) There is no provision for decree modification by a non-party. (Pet. App. 30a.) Loveland chose not to participate or become a party to the Consent Decree.

Any change in interest or operating role of the MSD Polk Run Segment and/or Plant requires modification of the Consent Decree.

> If [the Board or Cincinnati] seeks to name a successor in interest to assume any or all of its interest in, or operating role with response

> to, the Sewer System or WWTPs, [the Board or Cincinnati] may request modification of this Consent Decree from U.S. EPA/Ohio EPA to amend this Consent Decree . . . . If the Parties agree on a proposed modification . . . , they shall prepare a joint motion to the Court requesting such modification and seeking leave to join the proposed successor in interest. If the Parties do not agree . . . [the Board] may file a motion seeking modification . . . however, nothing in this Paragraph is intended to waive the Plaintiffs' [U.S., Ohio, and ORSANCO's] right to oppose such motion . . . .
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> (Dist. Ct. ECF Doc. No. 131, § III(C).)

Loveland's State Court Action—a Collateral Attack to Modify the Consent Decree.

Loveland filed a complaint in the Common Pleas Court, Clermont County, Ohio (the "state court" action) seeking a judgment that the Board "return operation of the [sewer system] to . . . Loveland." (Pet. App. 5a.) (By now, the sewer system over which Loveland sought control had been vastly expanded and improved at the considerable expense of MSD ratepayers). Although *one third* of the fact allegations in Loveland's state court complaint were dedicated to the Consent Decree pending in federal court, Loveland sought to evade the federal consent decree issues by filing suit only against the Board in a state court, and did not include the Consent Decree parties—the United States, Ohio, ORSANCO, or Cincinnati—as defendants. (Dist. Ct. ECF Doc. No. 1, Ex. D.)

Loveland did, however, admit that the MSD Polk Run Segment, including the Polk Run Plant, is subject to the federal Consent Decree. (*Id.*) And, it sought a declaration from the state court sanctioning termination of the 1985 Agreement and compelling the Board's assignment and conveyance of easements to Loveland "to the extent necessary . . . to operate and maintain" the Old City System sewers, the post-1985 sewers built by MSD in Loveland, and all sewers and customers *outside* Loveland which are part of the MSD Polk Run Sub-basin. (*Id.*) Those customers are served by sewers and treatment works listed in the Consent Decree.

The State Trial Court Dismissed Loveland's State Court Action.

The state trial court issued a 20-page Decision/Entry dismissing Loveland's state court complaint for failure to state a claim. (Pet. App. 6a.) It did so after full briefing on the Board's motion to dismiss Loveland's complaint, full briefing on the Board's motion to dismiss Loveland's amended complaint, and oral argument.

The state trial court notified the parties that it would have granted a stay in the case had it not dismissed the action, in part, because:

> The federal court has clearly accepted jurisdiction of [the Board's] declaratory judgment action since it directly affects the Consent Decrees . . . . [T]he Court believes that judicial economy and the risk of inconsistent results mandate that only one court determine that issue. The Court . . . believes that the

> federal court is in a better position to make that determination since any decision that this Court would make would directly affect the Consent Decrees, over which the federal court has retained jurisdiction. . . . Had this Court not dismissed the case, it would not have considered the remaining state claims, if any, until the resolution of the . . . federal action. (Pet. App. 6a-7a.)

The state court case is on appeal, and has been stayed at Loveland's request. (Pet. App. 8a.)

The Board's Federal Complaint.

When Loveland sought to modify the Consent Decree, the Board filed a complaint in federal court (the "Loveland Case"). The plaintiffs in the Consent Decree Case, including the United States, were named as defendants. (Pet. 3.) The Board asked the district court to enforce its Consent Decree. (Pet. App. 12a.)

Consolidation with the Consent Decree Case and the United States' Interest.

The Board moved to consolidate the Loveland Case and the Consent Decree Case, which all parties to the Consent Decree supported. (Pet. App. 24a.) In doing so, the United States stated that

- the "consent decrees were premised on the operating relationship between Loveland and the [Board] that has been in effect since 1985 and were specifically drafted to include the Polk Run system

in the definitions of Wastewater Treatment Plant and Sewer System"; and

- there "is little doubt that any decision altering ownership or control of the [MSD] Polk Run system or any portion thereof will have some impact on the decrees, to which the regulators [including the United States] *are* parties and have significant interests". (Dist. Ct. ECF Doc. 346, 1, 3.) (emphasis in original).

After consolidating the cases, the district court denied Cincinnati's motion to intervene in the Loveland Case as moot, noting that the issues raised by the Board were part of the consolidated matter and that the parties in the Consent Decree Case (including the United States) were able to assert and protect their interests regarding the Clean Water Act Consent Decree. (Dist. Ct. ECF No. 357, 3.) Because the United States could assert and protect its interest through the consolidated matter, the Board voluntarily dismissed its claims against the United States in the Loveland Case without prejudice. (Dist. Ct. ECF No. 364, 1-2.)

Denial of Motion to Dismiss / Grant of Judgment on the Pleadings.

The district court found that it had jurisdiction under 28 U.S.C. § 1331 and denied Loveland's motion to dismiss. (Pet. App. 6a.) The district court also granted the Board and Cincinnati's motion for judgment on the pleadings, finding that: Loveland failed to object to the Consent Decree despite having notice; that Loveland was seeking to modify the Consent Decree; that no Consent

Decree party sought modification; that Loveland sat silent for 5 years; that the Consent Decree parties relied on Loveland's silence as they crafted the complex, multi-year infrastructure improvements to implement the required remedies; and that inequity would result if Loveland were permitted to enforce its stale claim to terminate the 1985 Agreement, and thus modify the Consent Decree. (Pet. App. 8a.)

The district court enjoined Loveland from attempting to modify the Consent Decree through termination of the 1985 Agreement or otherwise—not forever—but only while the Consent Decree is pending. (*Id.*)

The Sixth Circuit Unanimously Affirmed the District Court Decision.

The court of appeals affirmed. In doing so, it concluded that federal jurisdiction existed: (1) because the Board asked the district court to enforce its Consent Decree; and (2) because subject matter jurisdiction arose under the substantial federal question doctrine. (Pet. App. 12a.) Loveland requested an *en banc* review of the Sixth Circuit's panel decision. No judge voted to allow that review. (6th Cir. Order, 10/27/2010.)

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS PROPERLY RECOGNIZED FEDERAL JURISDICTION IN ACCORD WITH OTHER CIRCUITS AND ADHERED TO THIS COURT'S LONGSTANDING REMOVAL JURISPRUDENCE.

The Sixth Circuit's decision presents no jurisdictional issues requiring review. First, because the decision addresses no state contract or state law claims, it neither creates nor magnifies any perceived split among the circuits regarding federal court jurisdiction. Second, the appellate court did not intrude into the state court's domain. It did not hold that a state court defendant could "create federal jurisdiction" by filing an original action in federal court that raises a federal defense to a state law claim. This is a red herring by Loveland. Loveland's actual state law case was *dismissed* and the *federal* appellate court addressed the Board's *federal* complaint. Third, the Sixth Circuit's decision does not conflict with the Seventh Circuit on whether an adverse impact to a consent decree, alone, provides federal question jurisdiction.

A. The Sixth Circuit Decision Affirming Federal Jurisdiction Complies with This Court's Precedent and Does Not Conflict with any Circuit.

The Sixth Circuit found that jurisdiction existed for two reasons: (1) because the Board requested "that the district court enforce its consent decree" over which the court retained jurisdiction; and (2) because the case "properly lies under the substantial federal question doctrine." (Pet. App. 12a.) Loveland ignores the first

basis for jurisdiction, which signals its strength and significance. Loveland then incorrectly asserts that the substantial federal question portion of the decision below conflicts with the decisions of other circuits. (Pet. 8.)

There is no conflict. The Sixth Circuit adhered to this Court's guidance in *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). Although Loveland acknowledges that the appellate court applied the required *Grable* analysis, it essentially argues that the court erred in applying the facts. If there is any circuit familiar with *Grable*, it should be the Sixth. Indeed, this Court affirmed the Sixth Circuit when it adopted the *Grable* analysis. *See id.* at 312.

Loveland relied upon *City of Warren v. City of Detroit*, 495 F.3d 282, 286-88 (6th Cir. 2007), to oppose jurisdiction below. (Pet. App. 9a.) The Sixth Circuit distinguished *Warren* as involving a request to interpret a state contract and not involving modification of a consent decree. (Pet. App. 11a-12a.) The factual difference is notable. The Sixth Circuit found jurisdiction here based on the request to enforce the consent decree. (Pet. App. 12a.)

The Sixth Circuit also applied the *Grable* analysis to find jurisdiction based on a substantial federal question. (Pet. App. 12a-15a.) It found the disputed federal issue to be whether the federal Clean Water Act Consent Decree could be modified by stripping a portion of the sewer system from the ownership/control of those obligated to fulfill the Consent Decree's mandates. (Pet. App. 12a-13a.) The court noted that it was impossible to resolve this issue without analyzing and interpreting the Consent Decree. (*Id.*)

Continuing to apply the *Grable* analysis, it found a substantial federal interest because: federal agencies negotiated the decree; the decree impacted thousands of ratepayers and was intended to comply with federal statutes; resolving Loveland's obligations under the decree, if any, would resolve the federal case; and, the decision on the federal issue would have a broad national impact as, depending upon the outcome, other entities could seek to circumvent consent decrees entered into between the United States and cities around the nation to enforce the Clean Water Act. (Pet. App. 13a.)

Completing its *Grable* analysis, the court found that exercising jurisdiction would not upset any federal/state balance of power as federal courts were already charged with enforcing the Clean Water Act and this federal decree arose from a matter already within the court's jurisdiction. (Pet. App. 14a.) The court further noted that the state trial court had already found that the federal court was the proper court to "resolve any issues that have a direct impact on the implementation of" the decree. (*Id.*) And, it noted that the floodgates to additional litigation could be opened if federal jurisdiction was not exercised because litigants could use state courts to attack and undermine a federal court's ability to police its decrees. (*Id.*)

Contrary to Loveland's assertion, neither the facts, nor holdings, of the cited cases from the Ninth, Seventh, and Fifth circuits are relevant. Each cited case dealt with cases that had been removed; this was an originally filed action. The Ninth Circuit found removal improper in the cited case because there was *no federal claim at issue* and federal law did little more than "shape a court's interpretation of state law." *Int'l Union of Operating*

Eng'rs v. County of Plumas, 559 F.3d 1041, 1045 (9th Cir. 2009). The Seventh Circuit found removal improper in the cited case because the claim for relief was *purely state tort law*, and the meaning of a federal statute would play little or no role in the action. *See Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 908-09 (7th Cir. 2007). And, the Fifth Circuit found removal improper as to a *state law malpractice claim* in the cited case where there was no disputed federal issue or law and the case would simply be decided on whether malpractice occurred during a federal trademark suit. *See Singh v. Duane Morris LLP*, 538 F.3d 334, 337-39 (5th Cir. 2008).

None of these circuit cases cited by Loveland are relevant here. The appellate court below recognized that an "adverse impact" alone on a consent decree was insufficient to confer federal jurisdiction. (Pet. App. 10a.) Here, however, there was far more than a mere adverse impact. Indeed, there is no question that a federal issue—modification of a Clean Water Act consent decree—is the heart of the case. It is not an ancillary or side issue. The appellate court resolved the issue of whether a federal consent decree could be modified; it did not resolve a state contract, statute, or legal claim. And, unlike *Bennett* (484 F.3d at 911) *or Singh* (538 F.3d at 340), where recognizing jurisdiction would transfer whole categories of suits to federal court, federal courts already have jurisdiction over enforcement and modification of federal consent decrees. To hold that state courts should determine modifications to Clean Water Act consent decrees over which federal courts maintain jurisdiction would be to turn federal jurisdiction on its head. That is what Loveland invites with its Petition.

Moreover, the district court "retain[ed] jurisdiction to enforce the terms and conditions and achieve the objectives" of the Consent Decree and to resolve disputes regarding its "construction, modification, implementation or execution. . . ." (Pet. App. 5a.) In short, it is not just how the facts of this case should be applied to this particular decree (although the facts do support the decision), it is that the action below involved the interpretation and enforcement—not of a state contract—but of a federal consent decree. This is reserved for federal courts.

B. The Sixth Circuit Did Not Intrude into the State's Domain; The State Dismissed Loveland's State Court Complaint.

Without basis in fact or law, Loveland claims that the district court somehow "seized" this matter from the state court and that the appellate court allowed an "end run" around this Court's removal precedent. (Pet. 14.) Both claims are specious. There was nothing for the district court to "seize" as this was not a removal case. Moreover, the appellate court circumvented no removal precedent as the Board filed its own complaint, asserting a federal claim, and Loveland's state court case was dismissed for failure to state a claim. The state trial court that dismissed Loveland's state court case also declared that the federal court was the proper place for an action, like this one, that would directly affect a consent decree over which a federal court maintained jurisdiction. (Pet. App. 14a.)

Finally, it was Loveland, through its "artful pleading"—and not the Board—that attempted to avoid the proper jurisdiction. (Pet. App. 12a.) Loveland filed a state court complaint ostensibly seeking to terminate the

1985 Agreement between the Board and Loveland. Yet, one third of the fact allegations in Loveland's complaint were dedicated to the Consent Decree. (Dist. Ct. ECF Doc. No. 1, Ex. D.) And, Loveland sought to avoid federal jurisdiction: (1) by not naming the parties to the Consent Decree, including the United States, as defendants even though their consent or the overruling of their objections by the district court was necessary for decree modification; and (2) by not directly stating that it sought to modify the Consent Decree. (*Id.*) But, it clearly did seek to modify the decree as it sought ownership and operational control over property included in, and governed by, the Consent Decree, including large areas and customer populations outside of Loveland's municipal boundaries, and sewers specifically under the jurisdiction of the decree.

The district court, appellate court, and even the state trial court, all found this to be true. The district court made a finding—not challenged below—that "[e]ven Loveland's statement that it has no intent to modify the Consent Decree rings hollow because although it states that it 'will satisfy any and all obligations related to the Polk Run Plant and the Polk Run System,' its current obligations under the Consent Decree . . . are larger." (Pet. App. 31a.) And, recognizing that Loveland sought to modify the decree yet avoid federal jurisdiction, the appellate court held that Loveland "cannot escape the district court's jurisdiction over its consent decree through artful pleading and argument." (Pet. App. 12a.)

The state trial court, too, recognized the federal issue in Loveland's complaint. After dismissing Loveland's complaint for failure to state a claim, the state court declared that had it not dismissed, it would have granted

a stay, in part, because any decision it would make "would directly affect the Consent Decrees, over which the federal court has retained jurisdiction. . . ." (Pet. App. 7a.)

While Loveland now claims that the Sixth Circuit permitted an "end run" around the removal requirements, it never challenged the Board's reasoning below as to why—apart from the fact that the district court had jurisdiction per 28 U.S.C. § 1331 and the substantial federal question doctrine—the Board recognized the central federal issue and filed an original action in the appropriate forum: the federal district court. Removal would have been improper here because the state court did not have jurisdiction over the United States, a party to the Consent Decree and in the case below. As this Court has previously held:

> As the state court was without jurisdiction over either the subject matter or the United States, the District Court could not acquire jurisdiction over them by the removal. The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there . . . .

Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co., 258 U.S. 377, 382 (1922).[4]

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4. *Lambert* was partially superseded by 28 U.S.C. § 1441 in 1986. The amendment eliminates derivative jurisdiction for cases removed from state to federal court for subject matter jurisdiction under § 1441. A subsequent amendment in 2002, as well as the

Accordingly, because the district court could not have obtained jurisdiction over the United States—a necessary party against whom the Board would have had to file a third-party complaint—pursuant to its derivative removal jurisdiction,[5] instituting an original action in the district court was necessary to ensure all parties with an interest in the litigation were subject to the district court's original jurisdiction.[6]

The state court, too, recognized the impropriety of Loveland seeking to take control over property subject to the Consent Decree, *i.e.*, to modify the Consent Decree, without including the United States and other Consent Decree parties that had an interest in the decree. As the state court concluded:

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approach overwhelmingly favored by the courts of appeal, confirm that for cases removed under sections other than 1441, federal courts still have only derivative jurisdiction. Specifically, where a federal concern, such as sovereign immunity, precludes state court jurisdiction, 28 U.S.C. § 1442 applies and removal is still improper. *See, e.g. Palmer v. City Nat'l Bank*, 498 F.3d 236, 239 (4th Cir. 2007), *certiorari denied* 128 S.Ct. 2495 (May 19, 2008)(holding that § 1441(f) limits the abrogation of derivative jurisdiction to removals under §1441).

5. *See Palmer*, 498 F.3d at 239 (affirming dismissal of removed third-party claim against the United States as "the state court did not possess jurisdiction over [the federal] defendants").

6. As indicated above, the United States was dismissed as a defendant in the underlying case after the district court consolidated the Loveland Case with the Consent Decree Case and declared that the United States, and other Consent Decree parties, were able to assert and protect their interests in the Consent Decree via the consolidated action. (Dist. Ct. ECF No. 364, 1-2.) Loveland did not challenge this on appeal.

> The Court would also note that there are other parties in the federal action . . . that have an interest in Loveland's [attempted] termination of the agreement. Those entities are not parties to the current state court action. Therefore, any decision this Court makes could have a direct impact on entities that are not parties to the action. The Court believes that . . . it would be more appropriate for those parties to assert their interests in federal court and allow this court to resolve any state issues that remain upon the conclusion of the federal action. (ECF Doc. No. 386, Ex. A, 19.)(emphasis removed)

Finally, Loveland asserts several false premises as it invites the Court to settle an "unaddressed" point of law: whether a state court defendant can file a federal defense or counterclaim as an original federal action to circumvent the limitations on removal. (Pet. 17.) First, Loveland's state court action was dismissed. (Pet. App. 6a.) And, although on appeal and stayed at Loveland's request, a decision affirming the state trial court would appear to moot this requested appeal. Second, the Board did adhere to the limitations on removal; it filed an original action that included the United States as a party. Third, there was original jurisdiction because: (1) the Board's original action asked the district court to enforce its Consent Decree; and (2) because subject matter jurisdiction arose under the substantial federal question doctrine. (Pet. App. 12a.) Loveland's failure to cite any case with this issue proves that this is not a regularly vexing subject.

C. The Sixth Circuit's Decision Does Not Conflict with the Seventh Circuit Regarding Whether Federal Question Jurisdiction Exists When There Is an Adverse Impact on a Federal Consent Decree.

Loveland is wrong to argue that the Sixth Circuit (1) held that "possible interference" with or an adverse impact on a federal consent decree creates federal jurisdiction and (2) conflicts with the Seventh Circuit's 15-year-old decision in *In re Application of County Collector*, 96 F.3d 890 (7th Cir. 1996). (Pet. 17-20.)

The Sixth Circuit did not so hold. Indeed, it specifically held otherwise:

> We also concluded that having an adverse impact on a consent decree was not enough to establish federal question jurisdiction because, under that logic, 'a slip-and-fall case would be removable to federal court because a damage award would affect [the consent decree party's] finances and consequently its ability to comply with the consent judgment, a result that would abrogate the well-pleaded complaint rule set forth in *Caterpillar* and *Franchise Tax Board*.'" (Pet. App. 10a.)

The appellate court recognized that the case below "involves more than [possible interference with or] simply the economic consequences of the consent decree on non-parties; it involves the attempted removal of property . . . from consent decree obligations." (Pet. App. 11a.) It involves the enforcement and/or modification of a federal consent decree.

Loveland wrongly suggests that the appellate court relied solely on the substantial federal question doctrine to find jurisdiction. That was only one basis for jurisdiction. The appellate court also found jurisdiction on the Board's "request[] that the district court enforce its consent decree" over which it "retain[ed] jurisdiction." (Pet. App. 12a.) And, as this Court stated in *Frew v. Hawkins:*

> [Such a] decree is a federal court order that springs from a federal dispute and furthers the objectives of federal law. . . . [E]nforcing the decree vindicates an agreement . . . reached to comply with federal law. . . . Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced.

540 U.S. 431, 438-40 (2004). The Sixth Circuit correctly held that the district court could enforce its decree, including the provisions dealing with decree modification.

Loveland also wrongly argues that the Sixth Circuit assumed that a federal consent decree is a "federal law." (Pet. 18.) The decision nowhere makes such an assumption. If it had, the court would have had no need to find that jurisdiction was also proper "under the substantial federal question doctrine." (Pet. App. 12a.)

This case is also highly distinguishable from *County Collector. County Collector* was both a removal case and a funding case; this case is neither. *County Collector*, 96 F.3d at 892. *County Collector* was about whether state law allowed a school district to levy certain taxes. *See id.* at 896. This case has nothing to do with those issues; it involves modification of a federal consent decree.

And, there was no question in *County Collector* that the state court plaintiffs "did not attempt to avoid federal court through artful pleading" because they "could not have presented their claims in a federal forum." *Id.* at 897. Here, Loveland sought to modify the Consent Decree and the appellate court found that Loveland could not "escape the district court's jurisdiction over its consent decree through artful pleading. . . ." (Pet. App. 12a.) Loveland could have filed its own federal action or sought to intervene in the Consent Decree case. Its "artful" attempts to avoid doing so distinguish it from *County Collector.*

Finally, *County Collector* does not conflict with the decision below. Both decisions note that an adverse impact on a federal consent decree is alone insufficient to confer federal jurisdiction. *County Collector*, 96 F.3d at 897; (Pet. App. 10a-11a.) Moreover, there is no federalism constraint at issue. Loveland's state complaint was dismissed and no federal court interpreted or ruled on a state contract or statute. And, the state court that addressed Loveland's claim to remove property from/modify the Consent Decree stated that the federal court with continuing jurisdiction over the decree should hear that claim. (Pet. App. 14a.)

II. LOVELAND SEEKS CERTIORARI ON AN ISSUE NEVER ADDRESSED BY THIS COURT AND NOT ADDRESSED BY THE COURT BELOW.

With its final argument, Loveland asks this Court to serve as a court of error. (Pet. 20-23.) Loveland disguises this fact by asserting that the case raises the issue of whether a non-party can be bound by a federal judgment solely because its conduct induced reliance on

that judgment. (Pet. 21.) Loveland's merits argument is wrong and the Sixth Circuit never held that Loveland was bound to a federal judgment, whether through its conduct or otherwise.

Loveland's merits argument suggests that the Sixth Circuit precluded Loveland's state law claim from being addressed by a state court. (Pet. 21.) This is inaccurate, as a state trial court addressed—and then dismissed for failure to state a claim—Loveland's state court claim.

Loveland also wrongly implies that the Sixth Circuit lacked facts upon which to reach its decision. Loveland had notice of the Consent Decree as a matter of law and it admitted it voiced no objection during the years Consent Decree work was performed in its jurisdiction. (Pet. App. 16a-17a.) Moreover, the district court found "no genuine dispute" that the Consent Decree parties "relied upon the assumption that Loveland ratepayers were part of MSD's global system" in "craft[ing] the complex, multi-year infrastructure improvements that have begun the implementation of the remedies required by the Consent Decree[]." (Pet. App. 31a and 8a.) The Sixth Circuit agreed and based its decision on the undisputed facts: Loveland had knowledge of the decree and the Board, and other Consent Decree parties, relied on its silence. (Pet. App. 17a.)

Finally, Loveland's argument that this Court's decision in *Taylor v. Sturgell*, 553 U.S. 880 (2008), and the application of *Taylor* by the Court of Claims in *Bartels Trust v. United States*, 88 Fed. Cl. 105 (2009), is a basis for certiorari is incorrect. Both *Taylor* and *Bartels Trust* were "virtual representation" and preclusion cases; this case is neither.

In *Taylor*, this Court noted that "The Restatement observes that a nonparty may be bound not only by express or implied agreement, but also through conduct inducing reliance on others. . . . We have never had occasion to consider this ground for nonparty preclusion, and we express no view on it here." *Taylor*, 553 U.S. at 894 n.7 (citing CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4453 (2d ed. 2002)). The Court did not "reserve" the issue in *Taylor*; it simply noted that it was not at issue. It was likewise not at issue in *Bartels Trust*, where the Court of Claims cited to *Taylor* to explain that conduct inducing reliance was not at issue. *See Bartels Trust*, 88 Fed. Cl. at 113-114.

The Sixth Circuit specifically found "Loveland's contention that it is not bound by the consent decree [to be] accurate. . . ." (Pet. App. 17a.) Thus, the Sixth Circuit did not hold that Loveland was bound by a federal judgment, whether through its reliance inducing conduct or otherwise. It likewise did not preclude Loveland from raising a claim because of a prior judgment. Loveland litigated whether it could modify the Consent Decree. Neither the district court nor appellate court were persuaded by Loveland's modification arguments. The Sixth Circuit upheld the district court's order enjoining Loveland from modifying the Consent Decree on grounds of laches and equitable estoppel. This, of course, disproves Loveland's contention that the Sixth Circuit found Loveland bound by the decree "solely because its conduct allegedly induced reliance." (Pet. 20.)

Loveland's underlying premise, that this is a non-party preclusion case, is simply wrong. The Sixth Circuit held that Loveland was *not* bound by the Consent Decree, whether through its conduct inducing reliance or

otherwise. Thus, the "unresolved" issue not yet addressed by this Court in *Taylor* was also not addressed by the Sixth Circuit. There is no ground for review here.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

CITY OF LOVELAND, OHIO,
Petitioner,

v.

BOARD OF COMMISSIONERS OF
HAMILTON COUNTY, OHIO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In an effort to divert attention away from the very real circuit conflicts over "arising under" jurisdiction, respondents devote much of their opposition to characterizing Petitioner Loveland's complaint as seeking "modification of the consent decree," which respondents then assume self-evidently arises under federal law. That argument is wrong at every level.

First, Loveland's state law contract claim has nothing whatsoever to do with modifying a consent decree. Loveland seeks only to exercise its state law right to terminate a state law contract with another state subdivision. The legal obligations applicable to

the Polk Run System itself are not at issue in that contract action, and the parties to the Consent Decree remain free to move the district court to bring Loveland into the Consent Decree litigation if it prevails in its contract action.

Second, respondents' assumption that *every* action involving both a federal consent decree and state law issues automatically arises under federal law begs the questions presented. Specifically, the circuits are poles apart in their interpretation of *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), and *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006), regarding whether the federal courts have jurisdiction over state law claims that entail the mere application of settled federal law to the facts of a state law claim. Three circuits have ruled that such claims do not arise under federal law. But two other circuits, including the Sixth Circuit here, have interpreted *Grable* and *Empire* much more expansively, and allow federal court jurisdiction over such claims. In addition, the Sixth Circuit's decision squarely conflicts with the law of the Seventh Circuit regarding whether federal question jurisdiction exists when the only federal element in the litigation is the alleged potentially adverse impact of a state claim on a federal consent decree.

The Board argues that the conflicting circuit decisions are not germane because they arrived in federal court via removal rather than as original actions. That misses the point. "Arising under" jurisdiction is determined by the same analysis whether the case is originally filed in, or is removed to, federal court. *Caterpillar v. Williams*, 482 U.S. 386, 392 (1987). This case *could* have materialized in federal court in

one of three ways—a declaratory action by the Board before Loveland filed in state court; a removal of Loveland's complaint; or, as occurred here, an original action after the state complaint was filed—but all present exactly the same legal questions: whether a case "arises under" federal law when it entails nothing more than the application of settled federal "law" to facts of a state law claim, and whether a consent decree constitutes federal law for purposes of 28 U.S.C. § 1331. Moreover, because the Board's federal action is simply the obverse of Loveland's state action—the Board alleging that a state contract law claim is barred—the facts to which the analysis is applied are also the same. Loveland wants to enforce its contract; the Board wants to prevent Loveland from doing so.

The Board tries to reformulate the case as petitioner's effort to "modif[y]" a consent decree." (Opp'n Br. 22.) That is not what Loveland's state law complaint requested and, in any event, the Board's repeated recitation of this mantra does not alter the fact that the Sixth Circuit upheld jurisdiction because Loveland's state law claim might adversely impact the Consent Decree.

Third, the Board reasons that the federal courts *must* be a proper venue because the state trial court dismissed Loveland's complaint. Putting aside that the dismissal is currently under appellate review, the Board's argument overlooks that, by the time the state court dismissed Loveland's complaint, two decisions from the federal court had already laid claim over the contract dispute. The state court obediently followed the federal court's direction.

I. THE DECISION OF THE SIXTH CIRCUIT EXPANDS A PRE-EXISTING CIRCUIT CONFLICT.

A. The Sixth Circuit's Opinion Conflicts With Three Other Circuits Concerning Whether the Mere Application of Federal Law to the Facts of State Law Claims Creates "Arising Under" Jurisdiction.

The Board strives mightily to ignore the existence and importance of the now-expanded circuit conflict over whether the mere application of settled federal law to a state law claim creates "arising under" jurisdiction within the meaning of 28 U.S.C. § 1331. The Board tries to reduce Loveland's position to an argument that the Sixth Circuit merely erred in applying the facts. (Opp'n Br. 13.) But Loveland's point is that the Sixth Circuit created an erroneous rule of law by holding that the "fact" that the Board sought to apply settled federal law to the specific facts of this dispute created "arising under" jurisdiction. Loveland seeks this Court's review not to resolve facts, but to address a real and outcome-determinative jurisdictional conflict among the circuits.

The Board backhands the circuit conflict on the ground that the decisions of the Seventh, Fifth, and Ninth Circuits were removal cases. (Opp'n Br. 14.) That is true. It is also irrelevant. The analysis of "arising under" jurisdiction is the same for removal and original cases. "[I]n order to properly remove an action pursuant to [§ 1441(a)], petitioners must demonstrate that original subject-matter jurisdiction lies in the federal courts." *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 33 (2002). The Board's

silent assumption that its "original" action to apply a consent decree to a state law contract claim arose under federal law begs the very questions presented: whether a federal consent decree automatically constitutes federal law for purposes of "arising under" jurisdiction, and, if so, whether the mere application of settled federal law to the facts of a state law claim is sufficient to trigger "arising under" jurisdiction.

This case captures that problem squarely because the facts at issue in Loveland's state action and the Board's federal action are the same, and the Board's legal claim is simply the negative of Loveland's complaint. Loveland's complaint requested a declaration that "the City of Loveland's notice of termination [of the 1985 agreement] . . . set for January 1, 2010 is reasonable." (Compl. D. Ct. ECF Doc. No. 1 at Ex. D.) The Board's complaint asked the district court to "declar[e] that Loveland cannot unilaterally terminate the 1985 Agreement between the Board and Loveland." (*Id.* at 17.) Put simply, enforcing state law contract rights and foreclosing the exercise of state law contract rights are state law *and* state court issues. Whether Loveland, if it prevails in state court, should be made a party to the Consent Decree is an entirely separate question that arises, if at all, only after resolution of the state law contract question. Furthermore, the Board, at most, is attempting to raise the Consent Decree as a defense to a state law contract claim, but the mere presence of a potential federal defense to state law litigation is not sufficient to create "arising under" jurisdiction.

Beyond those procedurally mistaken arguments, the Board has no answer to the conflict. It dedicated only a single sentence to each of the three cases that conflict with the decision below. (*See* Opp'n Br. 14-

15.) But the conflict is direct, the implications for federalism and comity considerable, and the consequences outcome determinative. The three circuits that are at odds with the Sixth Circuit have interpreted *Grable* and *Empire* as creating a jurisdictional distinction between state law claims that require the interpretation of federal law, and those that involve only the application of settled federal law to the facts of the state claim. The Sixth Circuit and the Federal Circuit have a substantially more expansive view of federal jurisdiction. Based on how they read *Grable* and *Empire*, federal jurisdiction exists where—as here—a state law claim involves the mere application of federal law to facts.

The Seventh Circuit held that a state law tort claim that implicated federal aviation regulations did not create arising under jurisdiction because the case presented "a fact-specific *application* of rules that come from both federal and state law rather than a context free *inquiry into the meaning* of a federal law." *Bennett v. Sw. Airlines, Co.*, 484 F.3d 907, 910 (7th Cir. 2007) (emphasis added). So too does this case, but the outcome is different.

The Fifth Circuit also distinguished jurisdictionally between a federal law's application to facts and a substantial dispute over its interpretation. *Singh v. Duane Morris, LLP*, 538 F.3d 334 (5th Cir. 2008). It held that a legal malpractice claim filed in state court, the resolution of which required the application of federal trademark law, did not arise under federal law. "[T]his case involves no *important issue of federal law*. Instead, the federal issue is predominantly one of *fact*," namely the application of settled federal trademark law to the facts of a state law malpractice claim. *Id.* at 339 (emphasis added).

The Ninth Circuit is in accord. For a federal law to be sufficiently at issue to justify federal jurisdiction, the party's claim "must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." *Int'l Union of Operating Eng'rs v. Cnty. of Plumas*, 559 F.3d 1041, 1044 (9th Cir. 2009) (quoting *Gully v. First Nat'l Bank*, 299 U.S. 109, 112-13 (1936)). Again, those jurisdictional outcomes ought not to turn on whether the paper initiating federal court jurisdiction is called a "complaint" or a "notice of removal," but on the peripheral role of federal law in what is fundamentally a state law claim.

The circuits' dichotomous interpretation of *Grable* and *Empire* is outcome determinative, allowing vastly different kinds and numbers of cases to enter the federal courts. The core of the circuit conflict is starkly captured by comparing *Singh* to *Air Measurement Technologies, Inc. v. Akin Gump Strauss Hauer & Feld*, 504 F.3d 1262 (Fed. Cir. 2007). In *Air Measurement*, the court found jurisdiction based on facts indistinguishable from *Singh*: a legal malpractice claim that required the application of federal law to determine the merits of the state law claim. The Federal Circuit, like the Sixth Circuit, interprets *Grable* much more expansively: "*Grable* did not hold that only state law claims that involve constructions of federal statute or pure questions of law belonged in federal court." *Id.* at 1272.

Had the Sixth Circuit followed *Bennett*, *Singh*, and *International Union*, and held that the mere application of federal law to facts is insufficient to confer federal jurisdiction, it would have dismissed the complaint. This Court's review is necessary so that the

federalism-rooted limitations imposed on the jurisdiction of federal courts can be consistently and correctly applied by all the circuits.

B. The Sixth Circuit's Decision Conflicts with The Seventh Circuit Regarding Whether a State Law Claim's Adverse Impact on a Federal Consent Decree Justifies Federal Jurisdiction.

The split between the Sixth Circuit and the Seventh Circuit exists at a second level, specifically, whether a state law claim's adverse impact on a federal consent decree begets federal jurisdiction. The Seventh Circuit's decision involved a state law claim that would "effectively frustrate . . . implementation of [a] consent decree" by drying up its source of funds. *In re the Application of Cnty. Collector*, 96 F.3d 890, 892 (7th Cir. 1996). Nevertheless, the court denied federal jurisdiction holding that "a state law claim does not present a federal question merely because it adversely impacts the terms of a federal consent decree." *Id.* at 896-97. Any argument that adverse impact to a federal consent decree supports federal jurisdiction is "inconsistent with Supreme Court precedent." *Id.* at n. 14.

That view of federal court "arising under" jurisdiction flatly contradicts what the Sixth Circuit held here. The Sixth Circuit predicated federal jurisdiction on its conclusion that Loveland's termination of its contract with the Board might have an adverse impact on the Consent Decree. (App. 11a.) The Board's claim that the Sixth Circuit did not rely upon "'possible interference' with or an adverse impact on a federal consent decree" (Opp'n Br. 21) is belied by the Board's repeated objection that jurisdiction was

proper because petitioner was (in its view) attempting to "modify" the consent decree. Putting aside that the resolution of the state law contract claim is entirely independent of the separate questions of what Loveland's and the Board's obligations might be under the Consent Decree if Loveland prevails, the Board's argument is simply the "frustration" argument rejected by the Seventh Circuit clothed in a different verb choice.[1]

II. THE SIXTH CIRCUIT'S DECISION, WHICH SANCTIONS THE USE OF A DECLARATORY JUDGMENT ACTION TO ALLOW A FEDERAL COURT TO WREST A CONTRACT CLAIM FROM THE STATE COURT WHERE IT WAS ORIGINALLY AND PROPERLY FILED, WRONGFULLY ALLOWS A SIGNIFICANT EXPANSION OF FEDERAL COURT JURISDICTION OVER MATTERS THAT HAVE HISTORICALLY BEEN RESERVED TO THE STATES.

The Board contends that federalism principles were satisfied because the state court dismissed Loveland's complaint. (Opp'n Br. 16.) This "no foul" call encapsulates the Board's failure to appreciate that the Sixth Circuit's jurisdictional aggrandizement caused very real harm. The state court's dismissal was the direct result of the federal court's assertion of juris-

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[1] *If* the state court rules in Loveland's favor and, *if* as a result, the parties to the Consent Decree believe it is necessary for Loveland to be bound by, or the Board relieved from, Consent Decree obligations pertaining to Polk Run, the Civil Rules provide multiple avenues for doing so. *See, e.g.*, Fed. R. Civ. P. 14, 15, 20, 60(b), and 60(d).

diction. The Board filed its motion to dismiss the state court complaint just one day *after* it filed its federal court complaint. Between that date and the date the state court dismissed Loveland's complaint, the district court made it crystal clear to the state court that it had taken jurisdiction over, and intended to decide, Loveland's contract claim.

More importantly, the state trial court dismissed Loveland's suit not for its own lack of jurisdiction over the contract claim, but on the ground that suit was premature. Accordingly, even if the state court's ruling is affirmed on appeal, this case is not remotely moot and this Court's intervention is needed to ensure that Loveland can reinstitute its suit against the Board[2] once it becomes ripe.

III. THE SIXTH CIRCUIT'S DECISION PRESENTS THE FAR-REACHING QUESTION WHETHER DUE PROCESS PERMITS A NON-PARTY TO BE BOUND BY A FEDERAL CONSENT DECREE SOLELY BECAUSE ITS CONDUCT ALLEGEDLY INDUCED RELIANCE.

The Board's central argument against review of the question "whether a nonparty may be bound through conduct inducing reliance on others," *Taylor v. Sturgell*, 553 U.S. 880 (2008), exposes the central flaw running throughout its opposition to certiorari. The Board asserts that "[t]he Sixth Circuit specifi-

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[2] As the United States and the other regulators were not parties to the 1985 Agreement, they are not appropriate, much less necessary, parties to the contract litigation. Loveland did not need to name them any more than a plaintiff would need to add the defendant's creditors because an adverse judgment might affect the defendant's ability to pay his debts.

cally found that 'Loveland's contention that it is not bound by the consent decree [to be] accurate . . . .'"[3] (Opp'n Br. 25.) That is precisely Loveland's point.[4] It is *not* a party to the Consent Decree, and thus all of the Board's arguments that Loveland is trying to modify the Consent Decree fall apart. A non-party's enforcement of its purely state law rights against a state entity does not "modify" a federal consent decree, especially when neither the elements of the state law action nor the relief sought require any interpretation of the decree. Because Loveland is not a party to the Consent Decree, the intrusiveness of federal jurisdiction is compounded in this case—the federal court jumped in front of a state court to address a state law claim between two political subdivisions just to apply a consent decree to a city that is not a party to it.

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[3] The Court actually said that "Loveland's contention that it is not bound by the consent decree, while accurate, is *immaterial*" because "Loveland forfeited its rights to contest the effects of the consent decree by unreasonably sitting on its rights." (App. 17a (emphasis added).)

[4] Notably, the Board does not challenge Loveland's contention regarding the ramifications of the court's decision—that it poses a potential obstacle to *numerous* persons whose rights are affected by the implementation of federal consent decrees to which they are not parties. That impact is what justifies the Court's review of this question.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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